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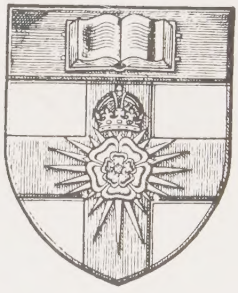

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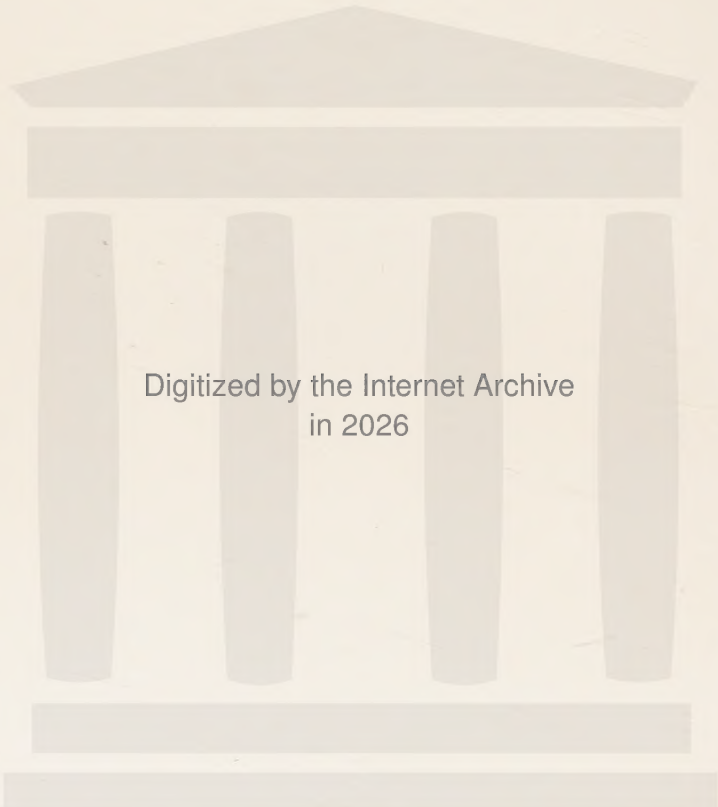

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CIRCUIT CASE (WESTERN CIRCUIT)

[HAMPSHIRE ASSIZES]

BEFORE

MR. JUSTICE LYNSKEY

R. *v.* MILLER

1953
Dec. 9, 10

Husband and Wife—Rape—Implied Consent to Intercourse—Revocation—No Separation Agreement or Court Order—Divorce Proceedings Commenced — Intercourse by Force —Charge of Assault Occasioning Actual Bodily Harm—Liability to Conviction — Assault Causing Hysterical and Nervous Condition.

A wife, who had left her husband, filed a petition on the ground of adultery. She gave evidence in support of the petition and the hearing was adjourned for the attendance of the husband. Subsequently the husband met her and had intercourse with her by force. The husband was indicted for rape and for assault occasioning actual bodily harm.

Held, (i) that at marriage a wife gives implied consent to intercourse with her husband and that, until that consent is revoked, the husband cannot be guilty of rape on her; that such consent may be revoked by a judicial separation, a separation order, or (*semble*) an agreement to separate, particularly if it contains a non-molestation clause, but it had not been revoked in the circumstances of the present case, and therefore the husband could not be guilty of rape.

CLARKE (1949) 33 Cr.App.R. 216 applied.

(ii) That, although a husband has a right to marital intercourse, he is not entitled to use force or violence in the exercise of that right, and if he does, he may be liable, not for rape, but whatever offence the facts of the particular case warrant, *e.g.*, wounding, inflicting grievous bodily harm, assault occasioning actual bodily harm or common assault. In the present case, therefore, the husband was liable to be convicted on the second count.

JACKSON [1891] 1 Q.B. 671 applied.

An assault causing an hysterical and nervous condition is an assault occasioning actual bodily harm.

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Trial before Lynskey J. at Hampshire Assizes.

The prisoner, Peter Miller, was indicted for the rape of his wife, Gwendoline May Miller, on May 21, 1953. A second count charged him with an assault upon her occasioning actual bodily harm on the same date.

In January, 1952, the prisoner's wife left him. She did not obtain a decree of judicial separation or a separation order, nor was there any agreement to separate. In January, 1953, she filed a petition for divorce on the ground of the prisoner's adultery. The petition came on for hearing in May, 1953. The prisoner was away at the time, but sent a letter to the court saying that he desired to be heard, and after the wife had given evidence the Commissioner adjourned the hearing generally. Subsequent to the hearing, on May 21, 1953, the prisoner met his wife and had intercourse with her by force.

At the trial counsel for the defence moved to quash the indictment on the ground that in law a man could not commit rape on his wife, and that it could not constitute an assault for a man to have intercourse with his wife even if she were unwilling, and further that the depositions disclosed no actual bodily harm. Lynskey J. held the motion to be premature and overruled it. At the close of the case for the prosecution counsel for the defence submitted that there was no case to be left to the jury on either count.

E. S. Fay for the prisoner.
N. J. Skelhorn for the Crown.

LYNSKEY J.: The prisoner is charged on an indictment containing two counts. The first count alleges that on May 21, 1953, he had carnal knowledge of Gwendoline May Miller without her consent. The second count alleges that he assaulted her and thereby occasioned her actual bodily harm. Before arraignment a motion was made by Mr. Fay for the defence to quash the indictment on the ground that at the time of the alleged rape Gwendoline May Miller was the wife of the prisoner, and also on the ground that the assault occasioning

her actual bodily harm could not be supported as no more was done by the prisoner than was necessary to enforce a husband's marital rights. I took the view at that time that, the indictment being regular on the face of it, there was at that stage nothing which could entitle me to quash it. The matter was argued before me, but in the end it was left open to the defence to submit that on the evidence there was no case on which the jury could convict on either of these counts.

With regard to the first charge, it is clear that the complainant was the wife of the prisoner and the point is taken by the defence that, in those circumstances, he cannot be guilty of rape upon her. Rape is the offence of having carnal knowledge of a woman without her consent by force, fear or fraud, and it is an essential ingredient of the offence that it must be without the woman's consent. It is argued that, in the case of a married woman, by the contract of matrimony she gives her consent to intercourse with her husband and that that consent cannot subsequently be revoked. The law on this matter was first dealt with many years ago in 1 Hale's *Pleas of the Crown*, p. 629. There it is said that " a husband cannot be guilty of rape upon his wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract." At that time it was, no doubt, considered that that consent, once given, could never thereafter be retracted. One can well imagine that, in the days when that book was written by Sir Matthew Hale, that was the accepted view of the law, because at that time a valid marriage could not be dissolved except by death, and the only way in which a marriage could be avoided was by a private Act of Parliament. There was no power to avoid a marriage by an act of the judiciary, but only by an act of the legislature. Since then there have been numerous departures from that view of marriage, but the view of the law as outlined by Hale, as far as I can see, has never been in terms overruled. It has been criticised by some judges, and approved by others, and the curious fact remains that in the many years that have passed since Hale's *Pleas of the Crown* was written there is no recorded

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case of a man being prosecuted for the rape of his wife until CLARKE (1949) 33 Cr.App.R. 216, which was tried by Byrne J.

The matter was considered, by way of *obiter dicta*, by a number of judges in CLARENCE (1888) 22 Q.B.D. 33. That was a case where a man was charged with unlawfully and maliciously inflicting grievous bodily harm on his wife and with assault occasioning actual bodily harm on her. At the time of the offence the husband was suffering from venereal disease which he knew might infect her, and the allegation was that she had been so infected. A special court for Crown Cases Reserved, consisting of thirteen judges, was called to consider the matter, and apparently their views differed considerably. Nine judges took one view and four took another. The decision of the majority was that the prisoner could not be convicted of either of the offences charged because, first, there was no assault, and secondly, no unlawful act occasioning bodily harm, by the husband; but in the course of the case the position of a married man with regard to rape on his wife was considered, and again the judges took different views. Wills J., who gave the first judgment, said (at p. 33): " If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible; a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority." A. L. Smith J. (at p. 37) took the view that: " At marriage the wife consents to the husband exercising the marital right. The consent then given is not confined to a husband when sound in body, for I suppose no one would assert that a husband was guilty of an offence because he exercised such right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife? " The interesting part of that observation is that apparently A. L. Smith J. took the view, contrary to that expressed by Hale, that a wife could revoke her consent to the right of the husband to intercourse. He does not suggest

that under all circumstances she can revoke it, but it is left generally at large. Stephen J., one of the greatest authorities on criminal law, said (at p. 46): "I wish to observe . . . and I was quoted as having said in my *Digest of the Criminal Law* that I thought a husband might under certain circumstances be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (p. 124, note) it will be found that that statement was withdrawn."

So far, there were three different views of the matter. Hawkins J. took the strong view that a husband could not be convicted of a rape on his wife. He said (at p. 51): "Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful; but there is a wide difference between a simple act of communion, which is lawful, and an act of communion combined with infectious contagion endangering health and causing harm, which is unlawful. It may be said that assuming a man to be diseased, still as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and, therefore, cannot be criminal. My reply to this argument is that if a person, having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege and which is unlawful and dangerous to another, he must either forgo his privilege or take the consequences of his unlawful conduct." That view of the law was a dissenting judgment, and it is a judgment which would appeal to a great many people as drawing a distinction between what a woman is assenting to and what she is not; that is, she is assenting to the act of sexual intercourse, but not to another act which is dangerous to her health, and there may be circumstances in which a woman would be entitled to refuse that which is dangerous to her health. In the Divorce Court that would be an act of cruelty. Field J. cited the passage I have quoted from Hale's *Pleas of the Crown* and said (at

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p. 57): "The authority of Hale C.J. on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime." Finally, Pollock B. said (at p. 63): "The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent." And he again quotes from Hale. Coleridge C.J. does not deal with the matter.

There are no other authorities that I can find prior to 1949 when this matter was considered, and the view which I take of the dicta of the judges in CLARENCE (*supra*) is that the statement of the law in Hale is still accepted by them, their observations being only *obiter*, but some seemed to lean to the view that the consent given by the wife at marriage could in some circumstances be revoked. That view appealed also to Byrne J. in CLARKE (*supra*). In that case the prisoner was charged with the rape of his wife at a time when a separation order made by magistrates on the ground of persistent cruelty was in force. The order contained the usual clause that the wife was no longer bound to cohabit with her husband. In ruling on that case the judge said (at p. 217): "As a general proposition it can be stated that a husband cannot be guilty of a rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising of the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them. In such circumstances the marital right of the husband exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of the consent given at the time of each act of intercourse, as is the case with unmarried persons. Then, that intercourse between husband and wife is,

therefore, not by virtue of any special consent, but is based on an obligation imposed on the wife by reason of the marriage." The judge then cited Hale's *Pleas of the Crown* and continued: "In the present case, the justices made an order on March 2, 1949, on the ground of the husband's persistent cruelty, containing a provision that the wife be no longer bound to cohabit with the husband. That order has in all respects the effect of a decree of judicial separation, and the result of it is that both the person and the property of the wife are protected by it. It could be discharged if the wife committed adultery or if she voluntarily resumed cohabitation with her husband, and by 'cohabitation,' as I understand it, is meant intercourse when the parties have begun to live together again, or intercourse although they are not living under the same roof. In this case at the material time the wife had not resumed cohabitation. The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract existed between them, but by a further process of law, namely the justices' order, her consent to marital intercourse was revoked, and thereafter, in my opinion, the husband was not entitled to have intercourse with her without her consent." The judge differentiated the case that he was trying from the general proposition as laid down in Hale's *Pleas of the Crown* in that, in the case he was trying, there had been a justices' separation order, which is the equivalent of a decree of judicial separation, and that order protects the person and the property of the wife. In other words, once that order is made, the husband has no right to interfere with the wife, her person or her property. I respectfully agree with him, and consider that that order amounted to a revocation of the consent given by the wife in the marriage contract.

The question which I have to consider here is whether, on the facts there is anything which can amount to a revocation of the wife's consent. There has been no separation order, no judicial separation and no agreement to separate. If there had

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been an agreement to separate, particularly if it had contained a non-molestation clause, I should have come to the conclusion that that also revoked the wife's consent. But here the facts are that the wife committed an act of adultery as a result of which a child was born in December, 1951. The prisoner condoned that act of adultery and took her back to live with him. In January, 1952, the wife left the prisoner because, according to her, he said that he would be harsh to the child born in December, 1951, who was then living with them. I have not sufficient evidence to come to a conclusion whether she was right or wrong in leaving, but there has been no decree of any court, and there never has been any agreement between the parties to live apart. It appears that the prisoner has at all times been trying to get her back. She says that she offered to go back on one occasion, but that he would not take her, but that matter is in dispute. In January, 1953, she issued a petition for divorce, in which she alleged that the prisoner had been guilty of adultery. That petition came on for hearing in May, 1953. The prisoner was away, but he sent a letter to the court saying that he wished to be heard. The Commissioner, therefore, adjourned the case generally and it is still awaiting trial.

Can I say that because the wife has left her husband and has issued a petition for divorce that I must infer revocation of the wife's implied consent? I have considered the matter very carefully, and I cannot see that, because a petition for divorce has been presented, that has any effect in law on the existing marriage. It is not until a decree *nisi*, or possibly a decree absolute, has been pronounced that the marriage and its obligations can be said to have been terminated. It is not as if there had been some interim order of a court. The petition might be rejected and in that event the marriage would still subsist and consent to marital intercourse as given in the marriage contract still be unrevoked. The result is that I must apply the law as it stands, there being no evidence here which enables me to say that the wife's implied consent to marital intercourse has been revoked by an act of the parties or by an

act of a court. The result is that, as the law implies consent to what took place so far as intercourse is concerned (but only to that extent), the prisoner cannot be guilty of the crime of rape, and I shall direct the jury that there is no evidence on which they can convict of rape.

With regard to the second count, which charges assault occasioning actual bodily harm, the proposition is put forward for the defence that the prisoner, having the right to marital intercourse, is entitled, for the purpose of exercising that right, to use as much force as is reasonably necessary to enable him to do so. No case has been cited to support that proposition, but a case has been mentioned which, in my view, is rather against it, namely JACKSON [1891] 1 Q.B. 671. In that case the husband had obtained an order for the restitution of conjugal rights against his wife, but she refused to return, whereupon the husband, with the assistance of an articled clerk, took possession of the person of the wife and carried her off to his house, and thereafter detained her there. She was allowed the run of the house, but was not allowed to leave it. The husband said that he had a right to her society and that his general rights included a right to marital intercourse, and he claimed that he was entitled to do what he did. The wife took out process for *habeas corpus*, and the Court of Appeal held that, although the husband had a right to his wife's society and although he had obtained a decree for the restitution of conjugal rights, he was not entitled to use force for the purpose of attaining his rights. It seems to me, on the reasoning of that case, that although the husband has a right to marital intercourse and the wife cannot refuse her consent, and although, if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right, and if he does so, he may make himself liable to the criminal law, not for the offence of rape, but for whatever offence the facts of the particular case warrant. If he should wound her, he might be charged with wounding; or if there is no wound, he may be liable to be convicted of inflicting grievous bodily harm, of assault occasioning actual

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bodily harm, or of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision.

The point has been taken that there is no evidence of bodily harm. The bodily harm alleged is said to be the result of the prisoner's actions, and that is, if the jury accept the evidence, that he threw the wife down three times, and there is evidence that afterwards she was in an hysterical and nervous condition. It is said by Mr. Fay that that does not amount to actual bodily harm. Actual bodily harm, according to Archbold's *Criminal Pleading, etc.*, 33rd ed., p. 992, includes "any hurt or injury calculated to interfere with the health or comfort of the prosecutor." There was a time when shock was not regarded as bodily hurt, but the day has gone by when that could be said. It seems to me now that if a person is caused hurt or injury resulting, not in any physical injury, but in an injury to her state of mind for the time being, that is within the definition of actual bodily harm, and on that point I would leave the case to the jury.

[The trial then proceeded on the second count, and the jury returned a verdict of Guilty of common assault.]

Solicitors: Geoffrey Wells & Woodford, Southampton, for the prisoner; Bernard Chill & Partners, Southampton, for the prosecution.

[IN THE HOUSE OF LORDS]

BEFORE

THE LORD CHANCELLOR (LORD SIMONDS), LORD PORTER, LORD OAKSEY, LORD TUCKER AND LORD ASQUITH OF BISHOPSTONE

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Summing-up—Accomplice—Necessity for Warning on Corroboration —Meaning of Term "Accomplice"—Issue of "Accomplice Vel Non" for Jury.

In a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, has now the force of a rule of law. Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroborative evidence, unless the court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

The term "accomplice" includes (i) persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours); (ii) on a trial for larceny, receivers as regards the thieves from whom they receive the goods; (iii) where a person is charged with a specific offence on a particular occasion, and evidence is admissible and has been admitted of his having committed crimes of the identical type on other occasions, as proving system or intent or negativing accident, parties to such other similar offences. No further extension of the term "accomplice" should be accepted.

In a case where it is not clearly established that the witness was a participant in the crime, but there is evidence on which a reasonable jury could find that he was, the issue of "accomplice *vel non*" is for the jury; and the judge should direct them

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that, if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated.

About eight youths, including the appellant, attacked four other youths, including one B., who subsequently died from stab wounds from a knife used in the attack. The appellant and five others, including L., were indicted for the murder of B. At the trial the Crown offered no evidence against L. and three others, and a verdict of Not Guilty of murder was returned in respect of them. L. subsequently pleaded Guilty to common assault and was sentenced to imprisonment. On the trial of the appellant and the fifth youth the jury disagreed with regard to both. Later the Crown offered no evidence against the fifth youth, and a verdict of Not Guilty of murder was returned in his case. On a retrial the appellant was tried alone and convicted. L. gave evidence for the prosecution against him, and the judge, though making it clear that L. had come from prison to give evidence, did not give the jury any specific warning on the manner in which they should regard his evidence.

Held, that if L. were to be an accomplice at all he had to be an accomplice to the crime of murder and there was no evidence that he was so, and there was, accordingly, no obligation on the judge to give the jury a warning with regard to his evidence.

Appeal by the prisoner from order of the Court of Criminal Appeal dismissing his appeal.

The appellant was convicted at the Central Criminal Court on October 22, 1953, on a retrial after disagreement of the jury, of murder and was sentenced by Hilbery J. to death.

The following statement of the facts is taken from the speech of the Lord Chancellor. On the evening of July 2, 1953, four youths, Beckley (the victim of the murder), Chandler, Ryan and Carter, were sitting on benches near a bandstand on Clapham Common. Two were on each of two benches facing each other, and each propped his feet on the bench opposite him, so that no one could pass between the benches towards the stand. Coleman came along and prepared to pass between the benches, but their occupants refused to give way and it would seem that one of them used, concerning Coleman, what he took to be an insulting expression. Coleman then went to a

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group of persons round the bandstand; and the four boys on the benches, fearing reprisals, withdrew towards what has been called " the Fountain," some way off. The group whom Coleman joined and to whom he said something about the affront he had suffered consisted of a number of people including Davies. From this group about eight, including Davies, later moved off towards the fountain in pursuit of the four. Before this happened two persons by the bandstand, a man called Leaver and a Miss Pilkington (neither of whom could by any stretch be called accomplices of Davies) agree that Davies, after hearing Coleman's communication, drew out a green-handled knife from his pocket—a small knife with a " push " handle. Leaver further says he heard Davies say : " I shall be all right with this." A lad called Wood also saw a green-handled knife in Davies' possession just after Coleman had spoken to Davies. Davies and his companions, including Lawson, then proceeded to the fountain, and a fight developed there between them and the four fugitives. Davies admits hitting Ryan, and Ryan later discovered a stab wound under his left arm-pit. Lawson was engaged in this fight. At some stage in it two of the fugitives alleged that someone shouted : " Get out the knives." There was no evidence that at this stage Lawson was still there or that he heard this cry. He swore he did not. Ryan and Carter seem to have moved off from the fountain in one direction while Beckley and Chandler fled in a different direction to a motor-omnibus, which they boarded while it was held up by traffic lights. When it reached its next stop they were torn from its tailboard by Davies and his followers. Davies admitted " doubling up " Chandler with a blow on the stomach, in which region, it appeared afterwards, he had been stabbed. Beckley was pursued to a point one hundred and thirteen yards beyond the bus stop. The evidence as to the precise succession of events at this stage was conflicting, but a Miss Frayling, sitting on the front right-hand bench on the top of the bus, testified that she saw Davies (whom she identified with the greatest confidence) " shake " someone, who could only have been Beckley, and who fell to

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the ground. She then saw Davies cross the road in front of the bus, and as he did so put a green-handled knife into his right-hand inside jacket pocket. In the same pocket later were found bloodstains. Beckley had eight or nine knife wounds, and died shortly after. There was further evidence of threats by Davies later on to two witnesses who said that, if necessary, they would say who was really responsible for Beckley's death.

The appellant, together with Coleman, Power, Lawson, Woodman and Allen, was indicted for the murder of Beckley. No evidence was offered by the Crown against Power, Lawson, Woodman and Allen, and the jury returned in the case of each of them a verdict of Not Guilty of murder. Lawson was subsequently charged with common assault, pleaded Guilty and received a sentence of imprisonment. On the first trial before Pearson J. the jury disagreed both as to the appellant and Coleman. Subsequently no evidence was offered by the Crown against Coleman and a verdict of Not Guilty of murder was returned against him. The appellant was retried alone before Hilbery J. and evidence was given for the Crown by Lawson. The judge made it clear that Lawson had come to give evidence from prison, but did not give the jury any specific warning on the manner in which they should approach his evidence.

The appellant appealed against conviction to the Court of Criminal Appeal and the appeal was heard by the court—the Lord Chief Justice, Mr. Justice Sellers and Mr. Justice Barry—on December 2, 1953.

David Weitzman, *Q.C.*, and *R. R. Russell* for the appellant.

Christmas Humphreys and *Maxwell Turner* for the Crown.

Cur. adv. vult.

Dec. 4. The judgment of the court was delivered by

SELLERS J. [after setting out the facts:] In support of the appeal learned counsel for the appellant, in his careful and

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forceful submissions, took many points criticising the summing-up of the learned judge and his conduct of the trial, but the court found no substance in the majority of the allegations and we do not deal further with them.

The main ground of appeal was that the learned judge had omitted to warn the jury that the witnesses Lawson and Wood were accomplices or to be regarded as accomplices and that it would be dangerous to rely on their evidence unless corroborated and it was submitted that there was no corroboration of the evidence of Lawson. No such warning was given and at no time in the trial was it suggested by anyone that these two men or either of them were accomplices or that the customary warning should be given by the judge, but this matter became the substantial ground of the appeal.

Wood had apparently taken some part in the fighting at the fountain, but not subsequently, and he was not charged with any offence. He spoke of the prisoner having a knife with a green handle before the attacks. Lawson was one of the number who started the attack at the fountain and he continued to the bus stop and remained throughout. He had originally been charged with the murder of Beckley along with Davies, Coleman, Power, Woodman and Allen, but when the matter came for trial no evidence had been offered against Lawson, Power, Woodman and Allen and a verdict of Not Guilty of murder was returned in each of those four cases. Lawson subsequently pleaded Guilty to a common assault and it was made clear at the trial that he came to give his evidence from prison where he was undergoing the sentence for that offence. The position, therefore, was that when Lawson gave his evidence he had been acquitted of the murder of Beckley and the prosecution submitted before this court that he could not, therefore, be an accomplice to the charge of murder. We think that that is so and that the learned judge was not required to treat Lawson as an accomplice, still less Wood. These two men had been engaged with others in an assault or series of assaults which cannot be too strongly condemned, but the facts negatived any participation by them in the murder.

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The fact that they were making an attack with their fists, and perhaps by kicking too, does not in itself associate them with the attack by one of their number with a knife or other weapon which caused death.

The learned judge was not, therefore, under any obligation to treat Lawson as an accomplice and to warn the jury in respect of his evidence and it was a matter of discretion whether or not he should give any caution to the jury on other grounds. It was submitted on behalf of the appellant that, if Lawson was not strictly an accomplice, he should have been treated as one. Reliance was placed on the cases of LEWIS (1937) 26 Cr.App.R. 110; FARID (1945) 30 Cr.App.R. 168, and ATT.-GEN. *v.* LINEHAM [1929] Ir.R. 19.

It may be that for the purposes of the rule which is concerned with the testimony of witnesses whose evidence may be influenced in the witness's own interest that the court should not seek to lay down a narrow or precise definition of an "accomplice." It may be that certain witnesses should, in the interest of a fair trial, be treated as accomplices. In FARID (*supra*) the witnesses in question were not accomplices with regard to the actual offence charged against the prisoner, but this court held that the warning should have been given. In the present case, however, we do not think it was obligatory for a warning to have been given in the customary terms as Lawson was not an accomplice and because in fact the appellant himself agreed in many respects with Lawson's evidence. When it was put to the appellant that he was disagreeing with Lawson and that therefore Lawson was lying, the appellant said he was under a misunderstanding.

Lawson's evidence was important. He said that shortly after the fighting and after Beckley had been left at the roadside, obviously seriously injured by the wound from which he died shortly afterwards, the appellant came to the coffee stall at the Plough and was talking to Lawson and Woodman. With this the appellant in his evidence agreed. In the course of the conversation Lawson said that the appellant stated all he tried to do was to run a knife up and down and he did not stab

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Beckley. In examination-in-chief the appellant admitted a conversation, but stated what he said was not Lawson's version, but this: "I said it looked like somebody had cut his face, cut Beckley's face. (Q.) And I think Lawson agreed, at any rate at one time, that the words which might have been used were that somebody must have put a knife up and down his face? (A.) Yes, Sir. (Q.) Is that what you said or something like that. (A.) Yes, Sir. (Q.) Was there any question of your saying anything like you had done anything with a knife? (A.) No, Sir, definitely not." And in cross-examination: "(Q.) Did you say to Lawson at the Café 'All I tried to do was run the knife up and down?' (A.) No, Sir. (Q.) That is an invention on his part? (A.) Not necessarily an invention; a mistaken statement. (Q.) It is a very, very different thing from 'He must have been cut' or something of that kind, is it not? (A.) Not a lot of difference, no." And later: "(Q.) Leaver, Wood and Miss Pilkington are telling lies about you with a knife in your hand before the fight? (A.) Yes. (Q.) Lawson, Brenda Wood, Sylvia Chubb and again Wood are all wrong in what you were saying after the fight? (A.) Lawson is mistaken; the others are wrong."

The difference between the versions was put to the jury by the judge and the issue on this point for them was whether Lawson was mistaken or was inventing his version or whether the appellant's statement was correct and what inference they would draw from or what effect they would give to the conversation. In these circumstances the appellant corroborated the incident, the conversation and a substantial part of the statement and it is not surprising therefore that at the trial nothing was said about Lawson being an accomplice and about corroboration being necessary. The jury came back and asked a question about Lawson's evidence and obviously attached importance to it. Several witnesses had spoken of the appellant having a knife; there was no evidence that any one else had a knife; Miss Frayling, after the affair at the bus stop, saw the appellant shake Beckley by the shoulders and afterwards close and place into the breast pocket of his coat a knife. The

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evidence of Lawson, if the jury accepted it, together with such bloodstains as were to be found on the appellant's clothing added pointers to the appellant's guilt.

Complaint was made that the jury were informed, partly in evidence by Superintendent Davies and partly by counsel for the prosecution, that there was no evidence that any of the other boys had knives in this fight and that is why the prosecution offered no evidence against the four and ultimately against Coleman after the jury had disagreed at the first trial of Davies and Coleman, where it was not contended that Coleman had a knife but that he knew Davies had a knife and he entered into the attack alongside of him. We think it is unfortunate that this matter was introduced in this way, even though it may have been prompted by certain questions by the defence, but there was in fact no evidence before the jury that any one of the other youths had a knife that night; it was not affirmatively suggested by the defence that any particular person had a knife; when Lawson was in the witness box, it was not suggested he had a knife and the learned judge stressed to the jury that they must be satisfied that it was Davies who stabbed Beckley and inflicted the wounds upon him from which he died.

We cannot therefore give effect to that ground of appeal. The appeal is dismissed.

Appeal dismissed.

The prisoner appealed to the House of Lords under a fiat from the Attorney-General.

David Weitzman, Q.C., for the appellant:

The substantial ground of appeal is that Hilbery J. in his summing-up did not apply to the testimony of Lawson the well-established rule relating to the evidence of an accomplice or warn them of the manner in which they should approach Lawson's evidence. There is a subsidiary ground of appeal, namely that improper references were made both by the prosecution and the judge to the position of the five other men, and

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evidence was wrongly admitted to show that they were not in the possession of knives at the material time.

With regard to the first ground, the following propositions of law are submitted: (1) In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict on his evidence, they should not do so unless it was corroborated. (2) This rule, although a rule of practice, now has the force of a rule of law. (3) Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 of the Criminal Appeal Act, 1907 (if they consider that no substantial miscarriage of justice has actually occurred). (4) It is enough to bring a witness within the ambit of the rule that there is a reasonable suspicion that he may have been an accomplice. (5) The question whether a witness was, or whether there is a reasonable suspicion that he may have been, an accomplice is a matter of fact which should be left for the determination of the jury, if there is evidence on which in law they can so find. Therefore, where such evidence exists, the warning must be given. (6) In determining that question the fact that another jury has acquitted the witness on the same charge as that brought against the prisoner is not admissible in evidence; moreover, if it were admissible it would not be conclusive evidence that he was not an accomplice. (7) For the purposes of the rule the term "accomplice" includes anyone criminally implicated in the transaction out of which the charge arises—a person who assists in the crime, whether or not he is guilty of it. (8) For the purposes of the rule evidence cannot be corroboration unless it tends to implicate the accused in the crime with which he is charged.

[He referred to DURHAM AND CROWDER (1787) 1 Leach 478; ATWOOD AND ROBINS (1788) 1 Leach 464; JONES (1809) 2 Camp. 130; FARLER (1837) 8 C. & P. 106; BOYES (1861) 1 B. & S. 311.] Since the coming into being of the Court of Criminal Appeal BASKERVILLE, 12 Cr.App.R. 81; [1916] 2 K.B. 658, is probably

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the clearest authority for the proposition that the rule that warning must be given is peremptory and that it is not merely a matter for the discretion of the judge, and that view of the law has been followed in DAVIES (1930) 22 Cr.App.R. 33; LEWIS (1937) 26 Cr.App.R. 110; FARID (1945) 30 Cr.App.R. 168, and expressed by the Eire Court of Criminal Appeal in ATT.-GEN. *v.* LINEHAM [1929] Ir.R. 19. MOORE (1942) 28 Cr.App.R. 111 seems to approximate to the earlier view that it is a matter for the discretion of the judge only, to which the court inclined in TATE, 1 Cr.App.R. 39; [1908] 2 K.B. 680. An accomplice clearly means something more than an actual participant in the crime. This is clear from cases such as JENNINGS (1912) 17 Cr.App.R. 242 and DIXON (1925) 19 Cr. App.R. 36, referring to receivers, and the comparatively recent case of FARID (*supra*), where it was held to apply to participants in similar crimes introduced by way of evidence as proving system. The rule is a rule of caution for the benefit of the prisoner, and it is against public policy that a conviction should be allowed to stand where the warning has not been given, unless it is clear that there has been no miscarriage of justice. Such a position will rarely arise; and it would not be proper for an appellate tribunal to adopt the test whether the weight of the corroborative evidence was sufficient to support the conviction. That would be tantamount to usurping the function of the jury, because an appellate tribunal could never know what weight the jury attached, or even a reasonable jury would be likely to attach, to the corroborative evidence. [He referred to RUDD (1948) 32 Cr.App.R. 138; GARLAND (1941) 29 Cr.App.R. 46n. and DIRECTOR OF PUBLIC PROSECUTIONS *v.* CHRISTIE, 10 Cr.App.R. 141; [1914] A.C. 545.]

[The LORD CHANCELLOR: Is the question for the House this: assuming that the witness is an accomplice, is it an inflexible rule of law that a conviction must be quashed unless the warning has been given to the jury, even if there was ample corroborative evidence?]

Yes, because there is a positive duty on the judge to give the jury the necessary warning. Moreover, it is not necessary to

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prove beyond reasonable doubt that the witness was an accomplice. It is sufficient if he is suspected of being an accomplice, and the possibility of his being an accomplice is not ruled out by the fact that a previous jury have acquitted him on a formal verdict, if there is evidence, as there was with regard to Lawson, on which it would be open to the jury to say that he took an active part in the transaction and was present on the occasion when the crime was committed. Apart from the extensions of the meaning of "accomplice" which have been accepted in the cases already referred to, the definition should be further widened. It is not necessary that the witness, in order to be an accomplice, should be guilty of the same offence as the prisoner. It is enough that he should be guilty of an offence so intimately connected with that committed by the prisoner that the one could not have been committed without the other. Or one could say that it was enough if he was guilty of an offence which could not be separated from the offence charged against the prisoner. The judge, in directing the jury, might ask: Can you consider one offence without necessarily considering the other? [He referred to DIXON (*supra*); ABIGAIL AND MACNAMARA (1893) 4 N.S.W.L.R. 72; REEVE (1917) 17 S.R.N.S.W. 81; and MCDONALD (1945) 84 Can.C.C. 177.]

The reasons for caution in accepting the evidence of accomplices are: (1) The accomplice being a criminal, his evidence is impugned; (2) he has a strong motive to remove suspicion from himself by fixing it on another; (3) if he has a spite against the accused, then, knowing all the circumstances of the crime, he will have little difficulty in making convincing false charges against him, although he (the accused) was innocent.

There was, moreover, evidence on which the jury should have been asked to consider whether Lawson was not an accomplice even in the narrowest sense of the term. There is evidence on which at least they might have reasonably suspected that he was guilty of murder, in that he remained in the fight after someone had shouted "Get out the knives." It was open to the jury to find that knife wounds were inflicted by more than one person. Certainly there was evidence that

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Lawson was at least a participant in the crime. The burden of showing that Lawson's evidence was corroborated was on the Crown, and this they failed to do. All the evidence was consistent with someone else having killed the deceased; the highest the Crown could put their case, apart from Lawson's evidence, was that the appellant had been seen to shake the deceased, but that did not necessarily imply that he stabbed him.

The subsidiary ground of appeal is based on the prejudice caused to the defence by references both by the prosecution and the judge to the position of the five other men involved in the assault, and in the admission of evidence to show that they were not in possession of knives at the material time.

R. R. Russell, following for the appellant:

It is not the law that the warning need not be given by the judge with regard to the evidence of an accomplice once the accomplice ceases to be in peril; otherwise when an accomplice has been convicted and is subsequently called to give evidence, no warning would be necessary, and this is manifestly not the law.

Peter Weitzman also appeared for the appellant.

The Attorney-General (*Sir Lionel Heald*, *Q.C.*), for the Crown:

The first three propositions submitted for the appellant (that the warning is obligatory) are accepted. The fourth proposition (that reasonable suspicion that the witness may be an accomplice is sufficient to necessitate the warning) is not accepted. The fifth proposition (that it is a question of fact to be left to the jury whether the witness is an accomplice) is accepted, except in so far as it referred to "reasonable suspicion" that the witness is an accomplice. The sixth proposition (that the acquittal of the witness was inadmissible in evidence) is accepted to the extent that the acquittal did not afford conclusive evidence that he was not an accomplice. The seventh proposition (that anyone criminally implicated is an accomplice) is rejected. The eighth proposition (that the corroborative evidence must implicate the prisoner) is accepted.

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The Crown's propositions are as follows: (1) An accomplice is a person against whom a jury has found, or might properly find, on the evidence available, that he was a principal or accessory or that he aided or abetted in the commission by the accused of the crime about which evidence was being given. (2) In respect of the evidence of an accomplice so defined, the trial judge must warn the jury that it is dangerous to convict in the absence of corroboration. Omission to give such a warning constitutes *per se* a miscarriage of justice within the meaning of section 4 (1) of the Criminal Appeal Act, 1907, and the appellate court must quash the conviction unless it can apply the proviso to the section. (3) In respect of the evidence of a witness who is not an accomplice so defined, but whose evidence may reasonably be considered suspect as being for some reason tainted or unreliable, the trial judge is not obliged to give, and it is a matter for his discretion whether or not he shall give, any such warning, having regard to the nature of the witness and his evidence and to the corroboration available. Omission to give a warning in such a case does not *per se* constitute a miscarriage of justice.

With regard to the second proposition the Crown cannot support a halfway house and contend that there may be a case where there was so much corroborative evidence that the failure to warn was not fatal. It must be fatal unless it can be covered by the proviso to section 4 (1) of the Criminal Appeal Act, 1907, which the Crown does not ask the House to apply in the present case. The authorities follow two divergent lines on the question whether a warning with regard to the evidence of an accomplice is obligatory or not. TATE (*supra*) and MOORE (*supra*) suggest that there is no inflexible rule; on the other hand, DAVIES (*supra*) and LEWIS (*supra*), which followed the very definite enunciation of the rule in BASKERVILLE (*supra*) that the warning is obligatory, support the contention for the appellant. The same view was expressed in FARID (*supra*) and the Irish case of ATT.-GEN. *v.* LINEHAM (*supra*) is strongly in favour of the view contended for on behalf of the appellant and is a factor which has influenced the Crown in accepting the

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proposition submitted for the appellant. If the case had been heard in England, the court would have held that the omission to give the warning could be cured only by the application of the proviso.

In the present case there was no obligation on the judge to give the warning with regard to Lawson, because he was not an accomplice, in that he was neither guilty of nor accessory to the murder. Where a witness is not an accomplice but merely a tainted witness, it is within the discretion of the judge to give the warning or not, and there is no ground for saying that in the present case the judge exercised his discretion on any wrong principle. The Crown, therefore, support the conclusion of the Court of Criminal Appeal, but not the reasons of its decision, for it cannot regard the acquittal of the witness as decisive of the question whether he was an accomplice or not.

Christmas Humphreys, following for the Crown:

Lawson was not an accomplice and no one asked the judge to treat him as such. He was acquitted of the murder on no evidence being offered by the Crown, the judge being satisfied that there was no evidence on the depositions. In the absence of later evidence to the contrary, that acquittal was conclusive. It was never suggested to Lawson in cross-examination that he had used a knife. The judge was, therefore, entitled to exercise his discretion whether to give the jury any warning with regard to Lawson's evidence or not, and he did frequently refer to him as having come from prison.

Maxwell Turner also appeared for the Crown.

David Weitzman, Q.C., in reply:

The submission of the Crown appears to constitute two categories, accomplices and near-accomplices, but no authority warrants this classification. A person must be an accomplice if he is guilty of an offence so intimately connected with the offence charged that the one could not have been committed without the other. However, even accepting the Crown's definition of an accomplice, Lawson fell within it.

At the conclusion of the arguments the Lord Chancellor (Lord Simonds) said:—

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My Lords, the House has heard full and careful argument from both sides and I understand that your Lordships agree with me in entertaining no doubt that this appeal should be dismissed. As, however, some questions of general principle have been raised on which the House may deem it proper to pronounce, I propose to move from the Woolsack the dismissal of the appeal, while the House takes time to formulate such opinions on these general questions as it seems right to express.

The House then voted that the appeal should be dismissed.

Feb. 19. The following opinions were read.

THE LORD CHANCELLOR (LORD SIMONDS): My Lords, this is an appeal from a judgment of the Court of Criminal Appeal, pursuant to the fiat of the Attorney-General, who certified that the case raised a point of law "of exceptional public importance." The appellant had, on October 22, 1953, been convicted of the murder on Clapham Common of a youth called Beckley. He appealed to the Court of Criminal Appeal and his appeal was dismissed by that court on December 2, 1953, the court's reasons for its judgment being delivered by Sellers J. two days later. On December 10 the Attorney-General gave his certificate. The appeal was heard before your Lordships on January 12–15, 1954, the House, at the close of the argument, intimating their decision to dismiss the appeal, but deferring till later their statement of their reasons for doing so.

Before coming to the facts I should refer to the course of certain earlier proceedings. The trial of October 22, 1953, was the sequel of an earlier trial at which the jury were divided. At the earlier trial, not only Davies but five other youths were indicted for the murder in question. The case was tried before Pearson J. All six pleaded "Not Guilty." Against four of them—Power, Lawson, Woodman and Allen, the Crown offered no evidence on the charge of murder, and the jury returned a formal verdict of "Not Guilty" on that issue. Coleman and the present appellant, Davies, stood their trial for murder. On September 21, 1953, the jury disagreed as to both, and the Crown announced that there was no intention to proceed with

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the charge of murder against Coleman. On September 22 no evidence was offered against him and the jury found him " Not Guilty " of murder. The five defendants acquitted of murder were then arraigned on a charge of common assault, pleaded Guilty and were sentenced to sundry terms of imprisonment. It is, perhaps, pertinent to add that at this first trial Lawson and Woodman, two of the persons against whom no evidence was tendered on the charge of murder, were called as witnesses against Coleman and the appellant Davies: and that the learned judge warned the jury that their evidence should be treated as that of accomplices. The second trial, in which the charge was murder and the sole defendant was Davies, came on for hearing before Hilbery J. on October 19, 1953. The trial resulted in the conviction of the defendant. The main ground of this appeal is that Lawson was again called as a witness, but that Hilbery J., in his summing-up, did not give the jury the warning which, it was said, was appropriate and necessary in relation to the evidence of a witness who was, or might well be, an accomplice: that there was an inflexible rule of law calling for such a warning: and that as it was not complied with, the conviction must be quashed. (There was a second and subsidiary ground with which I will deal briefly hereafter.)

Before dealing with the main contention I will summarise shortly the evidence given at the trial. [The learned Lord Chancellor then stated the facts as set out above and continued:]

It is manifest that this evidence would, on a proper direction to the jury, have been abundantly sufficient to support a verdict of guilty, there being ample evidence that Davies possessed and produced a knife and none that anyone else possessed one. But it is said that there was not a proper direction, inasmuch as Lawson was called and gave certain evidence; and Lawson was an " accomplice " of Davies; and the judge gave no warning that Lawson's evidence should be treated with corresponding caution. It is not disputed that the learned judge gave no such warning. Lawson's evidence was, briefly, that, some time after the affray, and after he had

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heard of Beckley's death, he met Davies at a coffee stall in Venn Street, and that Davies said to him that all he tried to do was to " run a knife up and down," and illustrated by a gesture the difference between this and stabbing. He agreed in cross-examination that at the earlier trial he had agreed that Davies might have said : " Somebody must have run a knife . . ." not " I must have run a knife " up and down, but that he thought it was the latter. In statements to the police, oral and written, Lawson had originally denied all participation in the fight. Later in further written statements to the police and in his evidence at both trials he admitted being present both at the fountain and the bus-stop phases of it, and in the box admitted that in his earlier statements to the police he lied. The judge, in his summing-up, dealt with Lawson's evidence and did not warn the jury that that evidence was, or should be treated as, the evidence of an accomplice. It is argued for the appellant that this was misdirection—or, to use the exact language of section 4 (1) of the Criminal Appeal Act, 1907, a " wrong decision on a point of law." It was not, nor could it, in my view, be argued for the Crown that, if this contention were right, the conviction could, nevertheless, be upheld under the proviso to that subsection on the ground that " no substantial miscarriage of justice " had occurred : *viz.*, on the ground that, if there has been no such misdirection, a reasonable jury must equally have convicted. The evidence, if admissible, was not unimportant, and the jury emerged from their retirement to ask the learned judge some questions about it.

My Lords, I will recur later to certain other features of the trial which appear indirectly relevant, but for the present will proceed to deal with three problems raised by the main ground of appeal, namely—(A) What is the scope and effect of the rule that a judge ought to warn juries in connection with the evidence of an " accomplice " ? (B) What is an " accomplice " within the rule ? (C) Whatever be the true answers to these questions, what (if any) is their application to the evidence of Lawson ?

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(A)—I do not propose to explore the remote historical origins of the rule, nor the old doctrine and practice of "approvement." It is clear that an accomplice is, and was, at all material times a competent witness, and that a conviction based on his evidence, though uncorroborated, could, and can today, be supported: and a judge may properly direct a jury that they are entitled if they choose to act on such uncorroborated evidence. But for over a century and a half it has been customary for judges to warn juries that it is dangerous to convict on such evidence, free though they are, if they find it wholly convincing, to do so. For most of that period it has been laid down that such a warning was not a precondition of a valid conviction, but was within the judge's discretion to give or to withhold [DURHAM AND CROWDER (1787) 1 Leach 478; ATWOOD AND ROBBINS (1788) 1 Leach 464, in which twelve judges to whom the question was referred stressed the discretionary nature of any directions given by the judge; Lord Ellenborough's observations in JONES (1809) 2 Camp. 130, at p. 131; SHEEHAN (1826) Jebb, Cr. & Pr.Cas. 56; FARLER (1837) 8 C. & P. 106 at p. 107; BOYES (1861) 1 B. & S. 311, at p. 320]—where the warning is referred to as "a practice which deserves the reverence of law but is not law actually."

My Lords, these authorities treat the rule as prescribing at most a salutary and usual practice, to be followed or not, at the judge's discretion: and the whole current of the decisions until the twentieth century is in this sense. But after the enactment of the Criminal Appeal Act in 1907, what was no more than a "practice" manifests an increasing tendency to assume the hard lineaments of a rule of law: and as such, many of the decisions of the Court of Criminal Appeal, especially since BASKERVILLE, 12 Cr.App.R. 81; [1916] 2 K.B. 658, treat it. But in other decisions of the same court the older, the discretionary view, still finds expression. A great many authorities were cited to your Lordships. It will be sufficient for the purpose of illustrating the dualism to which I have called attention, to cite relatively few. If I may

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summarise their effect in advance, I would say that the " discretionary " school of thought is illustrated by such authorities as TATE, 1 Cr.App.R. 39; [1908] 2 K.B. 560, and MOORE (1942) 28 Cr.App.R. 111, and the " peremptory " school of thought (if for brevity I may so call it) by decisions such as DAVIES (1930) 22 Cr.App.R. 33; LEWIS (1937) 26 Cr.App.R. 110; and FARID (1945) 30 Cr.App.R. 168; and, subject to certain qualifications which I will indicate when dealing with it, the case of BASKERVILLE (*supra*) itself.

TATE'S case (*supra*) was the earliest of this series being, indeed, decided shortly after the Court of Criminal Appeal was established. In that case the court quashed the conviction for want of a warning to the jury as to the need for corroboration of the evidence of an accomplice, but added that if there has been *in fact* enough corroboration, this would have excused the want of a warning and justified the maintenance of the conviction. It has been suggested that this last observation was *obiter* and the same suggestion may be made in regard to some of the decisions the other way. In MOORE (*supra*), however, the observation was not regarded as *obiter*, and again the existence of sufficient corroboration in fact was regarded as an adequate substitute for compliance with the rule. In 1916—between these cases—BASKERVILLE'S case (*supra*) was decided. The point directly in issue in that case was not what consequences flowed from the omission to give a warning. A warning, and a more than sufficient one, had *ex concessis* been given: and the only question directly for decision was whether there existed evidence which could amount to the corroboration for which the warning called. The court held it did. The judgment, however, went much outside the immediate issue raised, in an attempt to quieten doubts and settle the law. In this sphere of general principle the following passages from the judgment of a court which commands high respect (Lord Reading C.J., Scrutton, Avory, Rowlatt and Atkin JJ.), delivered by Lord Reading C.J., are relevant (12 Cr.App.R. at p. 87; [1916] 2 K.B. at p. 663): " There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see ATWOOD

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AND ROBBINS (*supra*). But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence: STUBBS (1855) Dears.C.C. 555; *Re* MEUNIER [1894] 2 Q.B. 415. This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal Act came into operation this court has held that, in the absence of such a warning by the judge, the conviction must be quashed. . . ." For this last proposition TATE (*supra*) is cited, but does not support it: for in TATE (*supra*), as has been observed above, the court would not have quashed the conviction, even in the absence of a warning, if there had been sufficient corroboration in fact. I continue to quote from BASKERVILLE's case (12 Cr. App.R. at p. 92; [1916] 2 K.B. at p. 668): "In EVEREST, the court said ((1909) 2 Cr.App.R. 130, at p. 132): 'The rule has long been established that the judge should tell the jury to acquit the prisoner if the only evidence against him is that of an accomplice, unless that evidence is corroborated in some particular which goes to implicate the accused.' We think 'tell the jury to acquit' should read 'warn the jury of the danger of convicting.'" Finally, Lord Reading C.J. says (12 Cr.App.R. at p. 94; [1916] 2 K.B. 670): "If the judge failed to give the warning, this court would be bound to set aside the conviction." These words, though they carry weight, having regard to their source, were unnecessary to the decision, as, indeed, were certain other parts of the judgment.

BASKERVILLE's case (*supra*), however, when every allowance has been made for the possibility that part of it is *obiter*, undoubtedly supports the proposition that the rule is "peremptory" and a breach of it incurable. There is no reference in BASKERVILLE's case (*supra*) itself to the proviso to section 4 (1). The view which it propounded was adopted in LEWIS (*supra*) subject to the possible operation of the proviso to section 4 (1)

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of the Criminal Appeal Act. In this case the Court of Criminal Appeal decided that if the warning be omitted, the conviction can only stand if there exists corroborative evidence of such a convincing, cogent and irresistible character that " the jury," if they had received the proper warning, must have come to the same conclusion. The court found itself unable to say, in that case, that " the jury " must inevitably have come to the same conclusion, and consequently quashed the conviction. The case, decided a few years earlier, of DAVIES (*supra*), qualifies the principle later applied in LEWIS (*supra*) to this extent, that even though the summing-up omitted any express warning as to accomplice evidence, the conviction could be supported in a case in which ((1930) 22 Cr.App.R. at p. 35) " from first to last, the case was conducted on the footing that the issue was whether the evidence of the bankrupt and his wife was confirmed by other evidence," and counsel for the appellant at the appeal admitted that counsel who appeared for the appellant at the trial did refer to the evidence of these witnesses as that of accomplices. This being so, the Court of Criminal Appeal was of opinion that " the jury " would inevitably have arrived at the same conclusion if an express warning had been given by the judge. If these two decisions are right in substance, yet each is subject, in my judgment, to this corrigendum, namely, that for " the jury " should be read " a reasonable jury." No appellate court can tell what a particular jury would have decided in circumstances which did not occur. Two other cases cited to us—RUDD (1948) 32 Cr.App.R. 138 and GARLAND (1941) 29 Cr.App.R. 46n. : but these cases concern the proper procedure as to warning and the like where one co-defendant gives evidence implicating another—a case with which your Lordships are not troubled here. The only decision of your Lordships' House in which the rule as to accomplices' evidence is touched on is DIRECTOR OF PUBLIC PROSECUTIONS *v.* CHRISTIE, 10 Cr.App.R. 141; [1914] A.C. 545, where Lord Atkinson's observations, inclining to the " discretionary " view, were plainly unnecessary to the decision, the evidence in dispute not

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being that of any accomplice, and the law as to accomplices' evidence only introduced as an analogy.

My Lords, having indicated the rival versions of the rule as to warning propounded in TATE'S case (*supra*) and MOORE'S case (*supra*), on the one hand, and the cases of BASKERVILLE (*supra*), DAVIES (*supra*) and LEWIS (*supra*), on the other, I have formed the opinion that whichever might be preferred if the matter were *res integra*, as things are the latter cases, laying down the stricter rule, have the preponderant weight of authority on their side, and should be adopted by your Lordships on this appeal. The true rule has been, in my view, accurately formulated by the appellant's counsel in his first three propositions, more particularly in the third. These propositions as amended are read as follows: "*First proposition*: In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. *Second proposition*: This rule, although a rule of practice, now has the force of a rule of law. *Third proposition*: Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to section 4 of the Criminal Appeal Act, 1907." The rule, it will be observed, applies only to witnesses for the prosecution.

The remaining questions, therefore, on the main issue are—(B) and (C)—What is an "accomplice" within the rule? And has the rule, on the proper construction of the word "accomplice" contained in it, any application to Lawson in the present case? There is in the authorities no formal definition of the term "accomplice": and your Lordships are forced to deduce a meaning for the word from the cases in which X, Y and Z have been held to be, or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:—(i) On any view, persons who are

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participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term " accomplice." But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purpose of the rule : *viz.*, (ii) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (JENNINGS (1912) 7 Cr.App.R. 242; DIXON (1925) 19 Cr.App.R. 36); (iii) When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted of his having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident : in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration : FARID (*supra*).

In both of these cases (ii) and (iii) a person not a party or not necessarily a party to the substantive crime charged was treated as an accomplice for the purpose of the requirement of warning. (I say " not necessarily " to cover the case of receivers. A receiver may on the facts of a particular case have procured the theft, or aided and abetted it, or may have helped to shield the thief from justice. But he can be a receiver without doing any of these things.) The primary meaning of the term " accomplice," then, has been extended to embrace these two anomalous cases. In each case there are special circumstances to justify or at least excuse the extention. A receiver is not only committing a crime intimately allied in character with that of theft; he could not commit the crime of receiving at all without the crime of theft having preceded it. The two crimes are in a relationship of " one-sided dependence." In the case of " system," the requirement of warning within the special field of similar crimes committed is a logical

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application within that collateral field of the general principle, though it involves a warning as to the evidence of persons not accomplices to the substantive crime charged.

My Lords, these extensions of the term are imbedded in our case law and it would be inconvenient for any authority other than the legislature to disturb them. Neither of them affects this case. Lawson was not a receiver, nor was there any question of " system "; Lawson, if he was to be an accomplice at all, had to be an accomplice to the crime of murder. I can see no reason for any further extension of the term " accomplice." In particular, I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use. It should be borne in mind in this connection that all suggestion of a concerted *felonious* onslaught had, by consent, at the instance of counsel for the defence himself been expunged from the Crown's case and from the issues put to the jury. Your Lordships would, I feel, be slow to permit counsel for the defence, having got that suggestion buried, to disinter it for the purpose of suggesting that Lawson was constructively an accomplice to the crime of murder and for that reason attracted the rule as to warning.

My Lords, I have tried to define the term " accomplice." The branch of the definition relevant to this case is that which covers " *participes criminis* " in respect of the actual crime charged, " whether as principals or accessories before or after the fact." But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a

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"*particeps criminis*" in the case in hand? In many or most cases this question answers itself, or, to be more exact is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witness concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for short, call a participant. The present case, in my view, happens to fall within this class, and can be decided on that narrow ground. But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a "participant." In such a case the issue of "accomplice *vel non*" is for the jury's decision: and a judge should direct them that if they consider on the evidence, that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so. The delimitation which I have outlined as proper, between the provinces of judge and jury in this particular matter, seems to me to be supported both by English authority and by Dominion decisions (*e.g.*, DIXON (*supra*); ABIGAIL AND MACNAMARA (1893) 14 N.S.W.L.R. 72; REEVE (1917) 17 S.R.N.S.W. 81, Australia; MCDONALD (1945) 84 Can.C.C. 177, Canada; and *cf. Restatement of American Law*, 2nd ed., Vol. 22, para. 797). This disposes of the main ground of appeal.

There was a second ground, very shortly and faintly argued, which can be dismissed in a few words. It was said that it was improper for the evidence of Superintendent Davies to be admitted, to the effect that in a very large number of statements (I think two hundred) made to him there was no allegation that anyone but the appellant possessed a knife. It is a sufficient answer to this that it was counsel for the appellant himself who cross-examined Superintendent Davies about the

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sufficiency and result of these inquiries. He was anxious to discover whether any of these statements contained any allegation of the possession by other members of the Davies' group of a knife or knives; his interrogation was directed to this purpose; and he cannot complain if the superintendent returned negative replies. The fact that the questions were put made the replies admissible if they were not otherwise so. Moreover, no objection was taken at the time to his answers.

My Lords, I think you will agree that this appeal has been most ably argued on both sides. There was certainly no contention open to counsel for the appellant to which he did not do full justice. Nevertheless, for the reasons I have now given, your Lordships were constrained to dismiss the appeal.

LORD PORTER: My Lords, I concur in the opinion that has just been expressed.

LORD OAKSEY: My Lords, I concur.

LORD TUCKER: My Lords, I concur.

LORD ASQUITH OF BISHOPSTONE: My Lords, I also concur.

Appeal dismissed.

Solicitors: Thomas V. Edwards & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SLADE

LAURENCE HENRY CHRISTOPHER DAVENPORT

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Larceny — Secretary of Company — Cheques Received from Employers—Duty to Fill in Name of Payee and Pay Accordingly—Cheques Made Payable to Bank of Creditor of Prisoner—Company's Account Debited in Some Cases—Cash Paid to Prisoner in Other Cases—Conviction Quashed in Part—Verdict of Embezzlement Substituted on Some Counts—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 44 (2)—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

The appellant, who was the secretary of a company, was in the habit of receiving from the company cheques in which the name of the payee was left blank. The appellant's duty was to fill in the name of the proper payee and pay over the cheques accordingly. Instead of so doing, he inserted as payee a bank where a creditor of his own had an account, and handed the cheques over to the creditor. In the majority of cases the cheques were presented by the creditor and, as the bank was also the company's bank, the company's account was debited accordingly, but in three cases the appellant handed the cheques to one S., who gave him cash for the cheques, which the appellant misappropriated. The appellant was in each case convicted of larceny of the sum of money represented by the cheque.

Held, (i) that with regard to the cheques other than those handed to S., though the appellant might in each case properly have been indicted for fraudulent conversion of the cheque, he was not guilty of larceny, because there was no asportation, the money paid on the cheques when the company's account was debited being the banker's and not the company's money. The conviction on these counts must, therefore, be quashed.

HILL *v.* FOLEY (1848) 2 H.L.C. 28 applied.

(ii) That with regard to the three cheques handed to S., the money, being the proceeds of the company's cheque, was received by the appellant for and on behalf of the company, and the appellant might, therefore, properly have been convicted of embezzlement of the money under section 44 (2) of the

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Larceny Act, 1916, and that under section 5 (2) of the Criminal Appeal Act, 1907, the court would substitute a verdict of Guilty of embezzlement in respect of the three counts to which those cheques related.

GALE (1876) 2 Q.B.D. 141 followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on October 23, 1953, on thirteen counts of an indictment each charging him with larceny of money and was sentenced by the Recorder of London to concurrent terms of eighteen months' imprisonment.

The appellant was the secretary of a company named Victoria Insurance Investments, Ltd. The practice of the company was to hand to the appellant blank cheques signed by two directors, which it was the appellant's duty to countersign and complete by filling in the name of the appropriate payee, and then pay over accordingly. Instead of doing so, in ten cases he inserted as payee the name of a bank where both the company and also a creditor of his own had accounts and handed the cheque to the creditor. In these cases the cheques were presented by the creditor of the appellant and the company's account was debited accordingly. In three cases he made the cheques payable to the Midland Bank, where a Mr. Samuel had an account, handed the cheques to Mr. Samuel and received from Mr. Samuel cash and an open cheque in exchange.

Eric Myers, for the appellant:

The case against the appellant was throughout conducted on the basis that, if the appellant was guilty of any offence, it was that of larceny of money, and the Recorder so directed the jury. Even if on the facts proved the appellant might have been indicted for some other offence, he clearly was not guilty of larceny, as the money in respect of which the company's account at Lloyds Bank came to be debited was not the company's money, but the banker's money. Once money has been paid into a bank by a customer, whether by cash or in

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the form of a cheque, it becomes the banker's money: HILL *v.* FOLEY (1848) 2 H.L.C. 28. The position with regard to the cheques handed to Mr. Samuel is, admittedly, somewhat different, because there the appellant himself received the proceeds of the cheques. A verdict of guilty of embezzlement might have been possible in respect of those cases, but it is submitted that the court should not substitute such a verdict, even if it has power to do so, as that aspect of the case was never considered by the jury.

Maxwell Turner, for the Crown:

It is conceded that there are substantial difficulties in contending that it was open to the jury to convict of larceny of money on any of the counts of the indictment, and it may well be that the appropriate charge in each case was one of fraudulent conversion of the particular cheque. The court cannot substitute such a verdict under section 5 (2) of the Criminal Appeal Act, 1907, because that was not a verdict which it was open to the jury to return; but a verdict of embezzlement of the money represented by the cheques was open to the jury under section 44 (2) of the Larceny Act, 1916, and with regard to the counts relating to Mr. Samuel could be supported on the facts, and the court is invited to consider the propriety of substituting such a verdict.

THE LORD CHIEF JUSTICE: The appellant was convicted before the Recorder of London on all counts except one of an indictment for larceny of moneys containing fourteen counts.

The case against him was this: He was the secretary of a company called Victoria Insurance Investments, Ltd., and that company's main business was to make loans to agents of the Liverpool Victoria Friendly Society to help them to buy their insurance books. I need not go through the long history of how these frauds were committed, or the elaborate scheme by which the appellant covered up the frauds that he was committing. He received blank cheques signed by two directors of the company which he had to countersign, and his duty was to pay those cheques to persons to whom the company

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wished to make payments. The names of the payees were left blank, and the appellant's duty was to fill in the name of the proper payees. Instead of doing that, with regard to a large number of the cheques—I will take the first four in respect of which he was indicted amounting to £2,250, that is, three of £500 and one of £750—he filled in the name of the payee as Lloyds Bank, Ltd., and he did that because he was owing money to a customer of Lloyds Bank for a yacht which he was buying for himself out of the company's money. The way in which he paid Mr. Lawrence, the man from whom he was buying the yacht, was that he made the cheques payable to Lloyds Bank. Mr. Lawrence paid them into his own branch of Lloyds Bank, the cheques were presented and the company's account was debited. Then there was a sum which he lent to a man named Goldman. He had no business to lend money to him, but Goldman repaid him by cash, and there were several other cheques which he used in the same way as I have described with regard to Lawrence. He always made the cheques payable to the bank of his creditor. He paid his creditor by handing to him his master's cheque made out to the credit of the bank.

With regard to certain sums, the sums referred to in counts 10, 12 and 13, the method was different. There, he got actual cash, and he did it in this way: he approached a Mr. Samuel, against whom there is no suggestion that he was assisting in this fraud—I suppose he was as much defrauded as anybody else—and he handed him in October, 1952, two cheques totalling £750, which Mr. Samuel cashed for him. The appellant again made out the cheques to the Midland Bank, which was Mr. Samuel's bank, and Mr. Samuel cashed the cheques by handing to the appellant £500 in cash and £240 in open cheques, which the appellant again cashed himself. I think he said he owed Mr. Samuel £10, so Mr. Samuel kept that. Then, a month later, in November, 1952, Mr. Samuel cashed another cheque for £500. The appellant made it payable to the Midland Bank instead of making it payable to the persons to whom his master intended him to make it payable. A little later

on, in January, 1953, there was a cheque for £200, which Mr. Samuel again changed for him by giving him £100 in cash and a £100 cheque.

For some reason or another the indictment charged the appellant with stealing all this money. That could only have been done, I think, because there was a misapprehension throughout this case, a misapprehension under which everyone seems to have laboured, with regard to an elementary principle of the law of banking and the law of larceny. There was no larceny here because in larceny there must be an asportation, a taking and a carrying away. The fallacy that led to the charges of stealing money was this : It was thought that because the master's account got debited that was enough to constitute a theft. But, although one talks about a person having money in a bank, it is just as well that it should be understood that the only person who has money in a bank is a banker. If I pay money into my bank either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. He does not hold my money as an agent or trustee; the leading case of HILL *v.* FOLEY (1848) 2 H.L.C. 28, exploded that idea. Directly the money is paid into the bank, it becomes the banker's money, and the contract between the banker and the customer is that the banker receives a loan of money from the customer as against his promise to honour the customer's cheques on demand. When the banker is paying out, whether in cash over the counter or by crediting the bank account of somebody else, he is paying out his own money, not the customer's money, but he is debiting the customer in account. The customer has a chose in action, that is to say, a right to expect that the banker will honour his cheque, but the banker does it out of his own money. Therefore, the money paid on these cheques was the banker's money but it led to the customer's account being debited. If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer at all, but he was charged

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with larceny, and it is quite obvious that he could not be convicted of larceny because he did not steal the company's money. He caused their account to be debited, but that is not the stealing of money.

The question is, therefore, whether we must quash the whole of this indictment. We must quash all the counts except the counts which relate to the transactions with Mr. Samuel, because there the appellant got Mr. Samuel to cash his master's cheque and got cash, bank notes, in his hands. It follows that that money, as it was the proceeds of his master's cheque, was received for and on behalf of his master and therefore the appellant embezzled that money because he applied it to his own uses instead of handing it over. This court has no doubt that that amounts to embezzlement. On that part of the case it is only necessary to refer to GALE (1876) 2 Q.B.D. 141 where the facts were: "The prisoner was the clerk or servant of an insurance company, and head manager of their chief office at L. In the ordinary course of business he received several cheques payable to his order from the managers of branch offices, and it was his duty to indorse these cheques and hand them over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. He then took the amount so received to the cashier and handed it over to him, saying he wished it to go against his salary, which was overdrawn to a like amount; and he got back from the cashier I.O.U.'s, which he had previously given for the amount of the overdraft." In other words, what the prisoner did was to use cheques for the purpose of reducing his own overdraft. The court held that he could have been convicted of the embezzlement of the cheques or the proceeds of the cheques and, in principle, I cannot see any difference between that case and this case. In that case the cheques were made payable to the prisoner's master. In this case the appellant received the cheques drawn by his master. He used those cheques to get cash and applied that cash for his own uses, and therefore he was guilty of embezzlement. In our

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opinion, that case entirely covers this case so far as the Samuel cheques are concerned. Therefore, we can apply the provisions of section 5 (2) of the Criminal Appeal Act, 1907, and say that what he ought to have been convicted of on those counts was not larceny but embezzlement, as section 44 (2) of the Larceny Act, 1916, provides that a person who is charged with larceny may be convicted of embezzlement if the facts show that he is guilty of embezzlement. Section 5 (2) of the Criminal Appeal Act, 1907, provides: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence." The jury must have been satisfied of all the facts. They must have been satisfied that there was a fraudulent act of the appellant, because they convicted him of stealing. They must also have been satisfied that Mr. Samuel did hand this money to the appellant, that the appellant received it as a clerk or servant and applied it to his own use.

The consequence is that the convictions on all the counts except 10, 12 and 13 will be quashed. As the appellant received only a sentence of eighteen months on each count, the court is certainly not going to interfere in a case where the appellant has been guilty of the most atrociously dishonest conduct and has received thousands of pounds. Why the learned Recorder passed only a sentence of eighteen months for frauds of this magnitude, I do not know. We cannot increase the sentence because there is no appeal against sentence, but we shall certainly not alter it by reason of the quashing of the other counts. The appeal succeeds with regard to those counts.

Conviction quashed in part.

Solicitors: Beach & Beach, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SLADE

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VINCENT ROY WARREN

Quarter Sessions—Committal for Sentence—No Appeal to Court of Criminal Appeal against Order of Committal—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29 (3) (*d*).

Where a prisoner has been committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948, as amended by section 29 of the Magistrates' Courts Act, 1952, he cannot raise, on an appeal to the Court of Criminal Appeal, the question of the validity of the order of committal. A contention that the order was invalid can be raised only by application to the Queen's Bench Division for an order of prohibition or *certiorari*, and an appeal lies to the Court of Criminal Appeal in such a case in respect of sentence only.

Appeal against sentence.

The appellant was convicted by a metropolitan magistrate of indecent assaults on four young boys, and was committed to the County of London Sessions for sentence under section 29 of the Magistrates' Courts Act, 1952 (replacing section 29 (1) of the Criminal Justice Act, 1948). On December 16, 1953, he was sentenced by the Appeal Committee to five years' imprisonment. The appellant had not previously been convicted of any offence.

M. Waters, for the appellant:

The magistrate here should not have committed the appellant to quarter sessions for sentence, because the appellant had no "character or antecedents" within the meaning of section 29 of the Magistrates' Courts Act, 1952, which would justify such a course. Granting that the word "antecedents"

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does not postulate previous convictions and is wider than the word " character," as was held by this court in VALLETT (1950) 34 Cr.App.R. 251, the phrase requires that, as a condition precedent to committal, there must have been something unsatisfactory in the previous history of the person committed. Here the appellant's history had been entirely satisfactory. In any event, the sentence was too severe.

J. H. Buzzard, for the Crown, was not called on to argue.

THE LORD CHIEF JUSTICE: The appellant was convicted before a metropolitan magistrate of four cases of indecent assault on small boys. He was what is known as a house father or house master at a London County Council reception home, that is to say, a place where small boys in need of care and attention or for some other reason are taken under the care of the local authority.

I am not going to describe the offences of which the appellant was convicted. It is enough to say that they were of a shocking description, and that there were four of them. There were two others suggested, but he did not make an admission of them, so they were not taken into consideration. All the members of the court are surprised that when these charges were made at the magistrates' court the prosecution asked the magistrate to deal with the cases summarily. It may be that they wanted to get the cases over so that the boys would not have to go to the sessions, that is to say, have to go to court twice, but this was a very serious case.

Section 19 of the Magistrates' Courts Act, 1952, provides: " If at any time during the inquiry into the offence it appears to the court, having regard to any representations made in the presence of the accused by the prosecutor or made by the accused, and to the nature of the case, that the punishment that the court has power to inflict under this section would be adequate and that the circumstances do not make the offence one of serious character and do not for other reasons require trial on indictment, the court may proceed with a view to summary trial." That was the section under which the

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magistrate was invited to deal with the case. But how anybody could be of opinion that this was not a serious case, or how anybody could have been of opinion that the punishment which a magistrates' court had power to inflict would be adequate, I confess I cannot understand. I should have thought that this was about as grave a case of indecent assault on young male persons as could well be imagined, every bit as serious as the class of case relating to scoutmasters or other cases which come before this court from time to time. Here was a man put in charge of these boys, and the evidence that was given showed a perfectly horrible state of affairs. The case ought to have been committed for trial—there is no question about that—but the magistrate was asked to deal with it, and I am not surprised that, when the magistrate heard all the facts, he said that in his opinion it was too serious a case for him to deal with because the utmost sentence which he could have imposed was twelve months' imprisonment. He said, therefore, that he would use the power now given partly by the Criminal Justice Act, 1948, and partly by the Magistrates' Courts Act, 1952, which enabled him, having convicted the prisoner, to commit him to quarter sessions for sentence. The Appeal Committee at London Sessions passed a sentence of five years' imprisonment. I am not altogether surprised that they did so, because it was a ghastly case.

The point that has been taken before us here is this: It is said that the magistrate ought never to have committed the appellant for sentence at all, because he can only commit for sentence if he has regard to the " character and antecedents " of the prisoner, and I understand that Mr. Waters wanted to argue that the appellant had no character or antecedents within the meaning of the statute which would have justified the magistrate in committing him for sentence. I am not going to attempt, especially as we have not heard argument on the words " character and antecedents " and because I see that this case in some respects is different from VALLETT (1950) 34 Cr. App.R. 251, to deal with the meaning of those words, but I am only going to consider what are the powers of this court, which

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is the Court of Criminal Appeal and is not the High Court of Justice, Queen's Bench Division. The fact that the judges are the same is quite fortuitous. We exercise a different jurisdiction and our jurisdiction is a purely statutory jurisdiction. I say at once that if a man who is committed for sentence desires to take the point that he was wrongly committed for sentence, in my view, the right course for him to take is to apply to the Queen's Bench Division for a prerogative writ, either a writ of prohibition directed to quarter sessions to prevent them from proceeding, and he must do that before he is before the sessions, and possibly, at a later stage, a writ of *certiorari*, to bring up the order of committal and quash it. Section 29 (3) of the Criminal Justice Act, 1948, provides: "Where an offender is so committed for sentence as aforesaid the following provisions shall have effect; that is to say:— . . . (*d*) if the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment. . . ." If he comes before the Court of Criminal Appeal, as he has in this case, he comes before this court, which has no power to issue *certiorari* and has no power to issue prohibition, solely because the Appeal Committee has passed a sentence which the court of summary jurisdiction would not have had power to pass. If the Committee had passed a sentence of twelve months, which the Court of Summary Jurisdiction would have had power to pass, there would have been no appeal to this court. He appeals to this court against the sentence as if he had been convicted on indictment. The sentence which quarter sessions passed was a sentence which they would have had power to pass if they had tried him on indictment. This subsection is intended to put quarter sessions, or rather the Appeal Committee who have to deal with the matter, into exactly the same position as though they had before them a prisoner who at quarter sessions had pleaded Guilty. That

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is quite clear if one reads the whole of the subsection. Subsection (*a*) provides: "The appeal committee or court of quarter sessions shall inquire into the circumstances of the case"—which of course they would do if the prisoner were before them and pleaded guilty—"and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment." Therefore, when he is once before quarter sessions, the conviction has been proved and the order of the magistrate committing him for sentence has not been challenged, the court of quarter sessions are to deal with him as though he had just been convicted before them on indictment. It is only in respect of offences indictable at quarter sessions that a prisoner can be committed for sentence. In a case a few years ago—R. *v.* MIDDLESEX QUARTER SESSIONS, *ex p.* DIRECTOR OF PUBLIC PROSECUTIONS, 34 Cr.App.R. 112; [1950] 2 K.B. 589—where a prisoner had been committed for sentence for an offence which was triable summarily or on indictment at assizes but not at quarter sessions, a Divisional Court upheld the decision of the court of quarter sessions that they could not deal with the matter at all because they would not have had power to deal with it on indictment.

In our opinion, it is quite clear that once the prisoner comes to this court we cannot inquire into the conviction; we can only look at the sentence which has been passed, and if we find that it is a more severe sentence than the court of summary jurisdiction could have passed, we can consider the sentence under the powers given to us by section 4 of the Criminal Appeal Act, 1907. Section 4 (3) provides: "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal." We can, therefore, quash the sentence passed at the trial and pass

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any other sentence, more or less severe, which we think ought to have been passed.

Our attention has been called to certain cases under the Vagrancy Act, 1824. The procedure under s. 5 of the Vagrancy Act has some likeness to the procedure under the Criminal Justice Act, for this reason: Quarter sessions can sentence a man who has been convicted by a magistrates' court of being an incorrigible rogue or vagabond. If he has been convicted at petty sessions as an incorrigible rogue, he can be committed for sentence to quarter sessions, and certain cases have been before this court in which the court has quashed the sentence because they found that the prisoner had not been convicted before the magistrates of being an incorrigible rogue. The section under which the court proceeds in that case is section 20 (2) of the Criminal Appeal Act, 1907, which provides: "This Act shall apply in the case of convictions on criminal informations and coroners' inquisitions and in cases where a person is dealt with by a court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824, as it applies in the case of convictions on indictments." Being an incorrigible rogue is not an offence of which the offender could have been convicted on indictment, and that subsection only gives the power to this court to deal with the sentence on a man who has been convicted of being an incorrigible rogue, but the words in the subsection we are considering, section 29 (3) (*d*) of the Criminal Justice Act, 1948, are "may appeal against the sentence as if he had been convicted on indictment."

We have, therefore, a man before us who comes and says: "I have been sentenced to more than the magistrate could have sentenced me, and therefore I appeal to you, but I have to appeal to you as if I had been convicted on indictment." We think we can only go into the question of whether or not, if he had been convicted on indictment, it was a proper sentence. If he wanted to challenge the magistrate's power to commit him for sentence, it must have been done by another procedure.

No injustice has been done to the appellant by the manner in which the magistrate dealt with him because it was a very

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serious case. He asked for it to be dealt with before the magistrate, and the magistrate did deal with it. Then the magistrate, having given him the warning that he might be committed to quarter sessions for sentence, exercised the power and committed him for sentence. Therefore, the only question we have to consider is whether the sentence of five years' imprisonment is one which we will allow to stand. I say at once that appeals made to the court on the ground of ill-health do not find very much favour with the court. This man had undertaken to put himself in the position of being a house-master of these small boys, and he committed shocking offences with them. It is a serious case, but we are willing to take into account that the appellant had previously been of good character, as far as is known, and may not have been subject to these tendencies for very long. With some hesitation, because we can well understand why the Appeal Committee passed this sentence—and we do not lightly interfere with sentences which an Appeal Committee passes—and taking all the circumstances into consideration, the court has come to the conclusion that they can reduce this sentence and substitute for it one of three years' imprisonment.

Sentence reduced.

Solicitors: Silvester, Amiel & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PILCHER AND MR. JUSTICE SLADE

1954
Mar. 1

PATRICIA MABER

Sentence—Breach of Probation Order—Probation Order to be Sent to Court Passing Sentence and to Court of Criminal Appeal.

Where a prisoner appears for sentence at a court of assize or quarter sessions following on breach of a probation order, the

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original probation order and the information on which the allegation of the breach was based should be sent to the court which passes sentence and, if there is an appeal, to the Court of Criminal Appeal.

Application for leave to appeal against sentence.

The applicant appeared at London Sessions on January 6, 1954, for sentence, having been committed for sentence under section 20 (3) of the Criminal Justice Act, 1948, for an offence of larceny and also following on breach of a probation order, having originally been placed on probation on conviction of obtaining money by means of a forged instrument. She was sentenced to Borstal training.

No counsel appeared.

PILCHER J.: This application is refused. This young woman was sentenced to Borstal training, having been sent to London Sessions for sentence after breach of a probation order, and it appears that the probation order, in respect of the breach of which she was sent for sentence, was not sent to London Sessions and it is not before us now. In our opinion, where anyone is sent for sentence following on breach of a probation order, the probation order should be sent to the court which passes sentence and to this court and the information on which the allegation of the breach was based should be with the papers. In this case, however, it is clear that the young woman was thoroughly unsatisfactory and did not co-operate with the probation officer and probably no harm has been done.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PILCHER AND MR. JUSTICE SLADE

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Mar. 1

PATRICK LAWRENCE FALLOWS

Sentence—Preventive Detention—Prisoner Under Thirty When Crime Committed But Over Thirty at Date of Sentence—Criminal Justice Act, 1948 (11 & 12 *Geo.* 5, *c.* 58), *s.* 21 (2).

A prisoner who is under thirty at the time of the commission of the crime but over thirty at the date when he appears for sentence is eligible for a sentence of preventive detention.

Application for leave to appeal against sentence.

The applicant was convicted at Lancashire Quarter Sessions on January 12, 1954, of attempted warehousebreaking and was sentenced by the Chairman to eight years' preventive detention. He was under thirty at the time of the commission of the crime, but over thirty when he appeared for sentence.

No counsel appeared.

THE LORD CHIEF JUSTICE: The only point in this case, which is an application for leave to appeal against a sentence of eight years' preventive detention, is that the offence for which the applicant was sentenced was committed a few days before he attained the age of thirty, but he was of the age of thirty at the time when he was dealt with by the court. This court can see no reason, therefore, why he is not qualified for preventive detention. He is a man with a perfectly shocking record. He has had two sentences of penal servitude, one of which was passed for an offence he committed after he escaped from prison where he was serving a four years'

sentence. He has had nine convictions since 1939, all for serious offences, and it is high time he was sentenced to preventive detention for the protection of the public. In our opinion, his age at the time of trial is the governing factor.

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Application refused.

BEFORE

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STANISLAW JURA

1954
March 8

Offensive Weapon—Carrying Without Lawful Authority or Reasonable Excuse in Public Place—Rifle Lawfully Obtained at Shooting Gallery—Unlawful Use of Rifle to Shoot Spectator —Conviction Quashed—Prevention of Crime Act, 1953 (1 & 2 *Eliz.* 2, *c.* 14), *s.* 1.

The appellant lawfully obtained an air rifle at a shooting gallery for the purpose of shooting at a target, but, while in the gallery, turned it on a woman companion and shot her in the hip. He was convicted of the carrying of an offensive weapon without lawful authority or reasonable excuse in a public place, contrary to section 1 of the Prevention of Crime Act, 1953.

Held, that the Act was intended to apply to persons who, with no excuse whatever, set out with offensive weapons; that the appellant had a reasonable excuse for carrying the weapon, and his subsequent unlawful use of it did not bring him within the ambit of the Act; and that the conviction must, therefore, be quashed.

Appeal against conviction.

The appellant was convicted at Leeds Assizes on December 15, 1953, of carrying an offensive weapon without lawful authority or reasonable excuse in a public place, and was sentenced by Oliver, J. to eighteen months' imprisonment.

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He was also sentenced to a concurrent term of six months' imprisonment for common assult, but did not appeal against the conviction or sentence on that count.

The appellant had obtained an air rifle at a shooting gallery for the purpose of shooting at a target. While in the gallery, he lost his temper with a woman companion, turned the rifle on her, and shot her in the hip.

The material portions of the summing-up appear in the judgment.

Geoffrey Baker, for the appellant:

The judge's direction to the jury on the construction of section 1 of the Prevention of Crime Act, 1953, was wrong. The appellant was not carrying the weapon without reasonable excuse; on the contrary, he had a reasonable excuse for carrying it. His subsequent misuse of the weapon, though it may well have constituted an offence under some other statute, was not within the ambit of the Act of 1953.

S. Snowden, for the Crown:

The Act was aimed, as the judge said, at persons carrying offensive weapons such as coshes, but its language is wide enough to embrace the possession of an offensive weapon in the circumstances of this case.

THE LORD CHIEF JUSTICE: The appellant was tried before Oliver J. at the last assizes for the West Riding of Yorkshire on an indictment containing four counts. On the first count he was charged with shooting with intent, namely, that he shot at a woman with intent to maim or disable her. To that count he pleaded Not Guilty, and as the jury did not agree on a verdict, the learned judge discharged them from doing so, because they were agreed on the other counts. On the second count he was charged with a common assault on the same woman, and the jury convicted him of that, and he was sentenced to six months' imprisonment. On the third count he was charged with possessing firearms with intent to endanger life. On that, the jury acquitted him, quite rightly. On the

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fourth count he was charged " with carrying an offensive weapon . . . without lawful authority or reasonable excuse in a certain public place," contrary to section 1 of the Prevention of Crime Act, 1953, the offensive weapon being an air rifle. On that he was convicted on a direction by the learned judge, and was sentenced to eighteen months' imprisonment.

The facts show that the appellant was in the company of a woman, and they went to a shooting gallery. In a moment of anger he turned round and fired the air rifle at the woman and hit her. It was only a very slight wound.

The learned judge left the issue on the fourth count to the jury in these words: " There was an Act passed this very year and it was passed primarily to deal with those young gentlemen who are often referred to as ' cosh boys.' This was intended to deal, prima facie, with them, but the language is quite wide enough to cover this case. This is the charge of being, without lawful excuse, in a public place, namely, Lister Park, in possession of an offensive weapon, namely, an air rifle. There, again, we come back to exactly the same position. If this was an accident, pure fortuity, then he is not unlawfully in possession of an air rifle. His possession only becomes unlawful if, in your opinion, he turned the rifle deliberately upon the woman. Then immediately his possession of it becomes unlawful and he is in possession of an offensive weapon in a public place. I cannot help you any more than that, except that, when the time comes, I will give you that list," which I suppose was a list of the counts in the indictment.

With respect to the learned judge, that direction cannot be upheld. The long title of the Act is: " An Act to prohibit the carrying of offensive weapons in public places without lawful authority or reasonable excuse." Then, subsection (1) of section 1 provides: " Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence, and shall be liable (a) on summary conviction,

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to imprisonment for a term not exceeding three months or a fine not exceeding £50, or both; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine not exceeding £100, or both."

The appellant was not carrying this rifle without lawful excuse, because he was at a shooting gallery where for the payment of a penny or twopence people can amuse themselves by firing at a target. He was carrying the rifle for that purpose. He had an obvious excuse for carrying the rifle. He made a use of the rifle which was unlawful, for which he might have been convicted of a felony. If a person, having a rifle in his hand for a lawful purpose, suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act, 1861, provides appropriate punishment for doing that. The Act of 1953 is meant to deal with a person who with no excuse whatever goes out with an offensive weapon, it may be a cosh or a knife, or something else. If, with all respect to the learned judge, his direction were right in this case, it would mean that anybody who was found in possession of a shotgun going to a shooting party and used his gun for an unlawful purpose, would be guilty of an offence under this Act.

In our opinion, there is no evidence that the appellant was carrying the weapon without reasonable excuse, and therefore the learned judge ought to have directed the jury to acquit on that count. Consequently, on this count the conviction will be quashed, but the appellant will complete his sentence on the other count.

Conviction quashed in part.

Solicitor : W. H. Leathem, Town Clerk, Bradford, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE GERRARD

JOSEPH BUTLER

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Forgery—Football Pools—Coupons in Some Cases Filled in by Prisoner in Name of Fictitious Person with Address Resembling his own—Coupons in Other Cases Filled in in Blank by Genuine Persons and Amount Inserted by Prisoner—No Limitation of Prisoner's Authority—Forgery Act, 1913 (3 & 4 *Geo.* 5, *c.* 27) s. 1 (2)—*Gaming Act*, 1845 (8 & 9 *Vict. c.* 109) s. 17

The appellant was convicted on six counts each charging him with uttering a forged document, there being in each case an alternative count of attempting to win money by fraud in wagering, on which also he was convicted. The transactions fell into two groups. In the counts relating to the first group, the appellant, who was a defaulter on football pools and knew that entries in his own name would not be accepted, sent in the coupon in the name of a non-existent person with an address to a greater or less degree resembling his own. In the counts relating to the second group, the appellant persuaded genuine persons to sign the coupons in blank and sent them in after having filled them in for stakes which those persons would never have authorised if they had been asked, though there was no evidence that any of those persons when handing the appellant the coupons had in any way limited his authority with regard to the amount of the stake.

Held that the convictions on the first group of counts should be affirmed, as the coupons, having been sent in in the names of fictitious persons, were by virtue of section 1 (2) of the Forgery Act, 1913, forged; but that the convictions on the second group of counts must be quashed, as the coupons were not forged by reason of the fact that none of the persons handing them to the appellant had limited his authority with regard to the stake to be inserted.

Appeal against conviction.

The appellant was convicted at Bournemouth Quarter Sessions on January 1, 1954, on six counts charging him

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with uttering forged documents, purporting to be Football Pool entries, and also in each case on an alternative count charging him with fraud in wagering. He was sentenced by the Recorder to twenty-one months' imprisonment.

The transactions fell into two distinct groups. The three transactions covered by counts 1 to 6 related to cases where the appellant had filled in the coupons in the name of non-existent persons with addresses to a greater or less degree resembling his own. The three transactions covered by counts 7 to 12 related to cases where the appellant had persuaded genuine persons to sign the coupons in blank, and had subsequently filled them in by inserting stakes which these persons would never have authorised had they known, but there was no evidence that any of these persons had limited the appellant's authority with regard to the amount of the stakes. The appellant was a defaulter on the Pools and knew that the promoters would not have accepted coupons sent in in his name. The material portions of the summing-up appear in the judgment.

J. H. Robbins, for the appellant:

The summing-up of the Recorder did not adequately put the defence to the jury. With regard to the first group of counts, the direction on intent to defraud was insufficient, and it was not clearly explained that, if the appellant's version that he was using the fictitious names solely to cause inconvenience to promoters of Pools with whom he had had disputes in the past was correct, there was no intent to defraud and he was entitled to be acquitted. With regard to the second group of counts, it was never established that the coupons were completed by the appellant without the authority of the persons who had signed them. None of them gave evidence that the appellant's authority with regard to the amount of the stake which he was to insert had been in any way limited. The coupons were, therefore, not forged within the meaning of the Forgery Act, 1913.

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Glyn Burrell, for the Crown.

With regard to the first group of counts, the Recorder's direction to the jury was adequate and the defence was fairly put. With regard to the second group, having regard to the circumstances of the transactions with the persons who signed the coupons, the jury were entitled to infer that they had never given authority to the appellant to insert the large amounts by way of stakes which he did insert, and that these amounts were inserted without their authority, and that, accordingly, the coupons were forged by the appellant.

THE LORD CHIEF JUSTICE: The appellant was convicted at Bournemouth Quarter Sessions on an indictment containing twelve counts, and they fell into two groups of six. I will read the first and second count as illustrations. The first count charged the appellant that on October 8, 1949, he uttered a forged document purporting to be a football pool entry by Peter Yorke, of Kinson Park Avenue, Kinson, Bournemouth; and the second count charged that on the same day by fraud in wagering on the event of certain football matches, by a wager of £10 falsely purporting to be made by Peter Yorke, he attempted to win to himself from Vernon's Pools Ltd., such sum of money as might arise upon the wager.

What was proved with regard to the first six counts can be succinctly put in this way. The appellant was a defaulter with the Pools in the sense that he had not paid in the past the money which he was bound to send them. The promoters would not, therefore, have accepted any coupons sent in by him. What he did was to send in coupons in a variety of fictitious names, giving an address which had some resemblance to his own, but in one case the address was so unlike his own that the Post Office would have been quite unlikely to deliver it.

The first question is whether those coupons were forgeries. It might be said that if a man disguised his name or address so thinly that money won on the coupon would have come to

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him he could not be said to have sent in the coupon from a fictitious person, but in this case I think that he could. The Forgery Act, 1913, provides, by section 1 (2) (*b*), that a document is false " if the whole or some material part of it purports to be made by or on behalf of a fictitious . . . person." There was ample evidence for a jury in this case to consider that these coupons were made in the name of fictitious persons; it was quite clear that if the appellant had made them out in his own name they would not have been accepted.

Then comes the question, whether or not there was an intent to defraud. That was a question for the jury. We felt some doubt with regard to the learned Recorder's direction, but, on the whole, we think that it was sufficient, because if a man sends in documents like these to concerns that may be paying out considerable sums of money in return for the documents, a prima facie case at least is established that he is doing it with intent to defraud, namely, dishonestly to get the money. The appellant's defence was that he sent the coupons in in this way because in the past he had won money in the Pools which had not been paid him and therefore he wanted to cause Vernon's and Littlewood's Pools the greatest amount of inconvenience. Anybody hearing a defence of that sort would say that it was all rubbish. At any rate one cannot be suprised if a jury take that view. The learned Recorder directed the jury: " It is quite simple to state what his case is, and Mr. Allen has put it very clearly on his behalf, but whether or not the defence is right depends upon whether you believe in the first place that he ever did make successful forecasts in respect of which he was never paid. It depends on the whole of that early part of the story which he tells, and if you think he has made up that story, then of course you might well say to yourselves, when he sends these documents, which he admits to be false, to Vernon's and to Littlewood's, is it possible for us to come to any other conclusion than that he was trying to get money on the basis of these false documents? " In our opinion,

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that is right, because, if the first part of his story—namely that the money which he won had been withheld—was untrue, there was no reason for this absurd story that he was trying to cause the promoters of the Pools inconvenience. It is an explanation which does more credit to his ingenuity in thinking out a defence than it does to his truthfulness. We cannot say that the direction was in any sense a misdirection; it really put the matter quite precisely and properly to the jury. We are, therefore of opinion that the convictions on counts 1, 3 and 5 of uttering forged documents can stand.

Then there come the convictions on the complementary or alternative counts 2, 4 and 6 which charged the appellant with attempting to win money by fraud in wagering. I do not think it is necessary to give any considered decision on all the counts which have to be proved in a case where this offence is charged. Each case must depend on its own facts, and in this case it appears to the court that, if the appellant was trying to get money on forged coupons, he must also have been guilty of the alternative crime of attempting to win money by fraud in wagering. We need not go further into the matter, because it would not increase the sentence in any way. Each pair of counts stands or falls together.

When we come to the last group of six counts, counts 7 to 12, different considerations arise. In those cases the appellant sent in coupons which were undoubtedly signed by genuine persons, he having persuaded those persons to lend their names and having filled the coupons in himself. There was no direction given to the jury to consider whether or not those persons had authorised the appellant to fill in the coupons in the way in which he did, but from the evidence there was no suggestion that the persons who had signed their names had expressly limited his authority. They left it to him to fill in the coupons as he liked. He had indeed filled in an amount for a widow who could not possibly have paid if she had been required to do so. If one person gives another a blank cheque, so to speak, he may and very often does find

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that he is let in for a considerable liability. For instance, if a bill of exchange is accepted in blank and is handed to another person, it is with authority to fill in any sum. If these people were stupid enough to get coupons and hand them to the appellant to fill in without saying that the limit was to be, for example 1d. or 6d., that does not amount in law to forgery.

The consequence is that the convictions on the first six counts are affirmed, and the convictions on the last six counts quashed, and the sentence will be reduced to one of twelve months' imprisonment.

Conviction quashed in part.

Solicitors: North, Kirk & Co., Liverpool, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE GERRARD

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JULIUS REITER
REGINALD HERBERT CARTER
GAYWOOD PRESS, LTD.
NEW FICTION PRESS, LTD.
ARC PRESS, LTD.

Obscene Libel—Test of Obscenity—Comparison with other Publications not to be Permitted.

The test of obscenity laid down by Cockburn C.J. in HICKLIN (1868) L.R. 3 Q.B. 360, at p. 371: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall" is the test applicable at the present day on a charge of obscene libel.

Cross-examination or positive evidence tendered for the defence designed to show that publications other than those

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referred to in the indictment and alleged to be not materially different in character from them circulated freely in the district and were available for sale either on the defendants' premises or elsewhere in the locality ought not to be admitted.

Dicta of The Lord Justice-General (Lord Cooper) in GALLETLY *v.* LAIRD, 1953 S.C.(J.) 16, at p. 27, approved.

Appeals against conviction and sentence.

The appellants were convicted at the Central Criminal Court on January 19, 1954, of publishing obscene libels and were sentenced by the Recorder of London, Reiter and Carter each to six months' imprisonment and each of the appellant companies to a fine of £2,000. The libels were contained in seven books.

Gerald Howard Q.C. and *Christmas Humphreys*, for the appellants Carter, New Fiction Press Ltd., and Arc Press Ltd.

The Recorder misdirected the jury on the manner in which the test laid down in HICKLIN (*supra*) should be applied at the present day. It is not disputed that the test is the right one, but the standards of the present day should be taken into consideration. The jury should have been invited to consider what was going on around them—for example, modern standards of films and other books printed and published without objection. The jury were inferentially told to draw the conclusion that it would be dangerous to take present day standards into account.

Christmas Humphreys for the appellants Reiter and Gaywood Press Ltd.:

The Recorder's summing-up really amounted to a direction to the jury to follow his personal opinion. The books which formed the subject of this indictment were not obviously *erotica* in comparison with other books which have recently been the subject of prosecutions. Obscenity cannot be defined in the same way as, for instance, larceny. It must be to a

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large extent a matter of opinion and regard should be had to other publications of the present day.

J. M. G. Griffiths-Jones for the Crown was not called on.

THE LORD CHIEF JUSTICE: The appellants were convicted before the Recorder of London and a jury of publishing an obscene libel. The indictment contained seven counts and there were seven books, the titles of which I refrain from mentioning because I have no desire to give any advertisement to this shocking literature, and the jury convicted in respect of all of them.

This appeal is brought entirely on the summing-up of the learned Recorder. Let me say at once that the learned Recorder's summing-up was perhaps, to a certain extent, rather more rhetorical than one could have wished, but he evidently felt strongly, and it is very difficult for a judge to control his feelings when he is dealing with publications such as there were in this case. I do not wonder that the learned Recorder spoke strongly, though it would have been better if he had reminded the jury in so many words that it was entirely for them to say whether these were obscene libels or not. He was not in any sense directing the jury to return a verdict of Guilty, because he more than once reminded them that if they had any doubt on the matter they were to acquit, and they could, of course, have acquitted in respect of some counts and not others. He wrote down for the jury the definition of obscenity and told the jury to consider the case from that point of view. The classic definition delivered by Cockburn C.J. in the Queen's Bench in 1868, in HICKLIN (L.R. 3 Q.B. 360, at p. 371) was: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

We are being asked to upset these convictions because something was not said about the standards of today. The

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learned Recorder said, and this court entirely agrees with him, that the law is the same now as it was in 1868 and, indeed, Mr. Howard in the forcible remarks he has addressed to the court has not sought to say differently. If that is the test, the jury today have to consider whether today the books have a tendency, to use the words, "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." When it is being considered whether books have a tendency to deprave and corrupt, naturally everybody's mind turns to the depraving or corrupting of young people into whose hands they may fall. There may be dirty-minded elderly people, no doubt, but it is not to be expected that many elderly people would read this stuff, but younger people might, and we are told that it circulates in the Armed Forces. The jury had to consider whether these books, when looked at in their entirety, would or would not tend to corrupt and to deprave. I can well understand that nowadays novelists and writers discuss things which they would not have discussed in the reign of Queen Victoria. Taking as examples well-known novelists, one may think that George Eliot went as far as the tendencies of her times allowed, and that Anthony Trollope veiled over certain things which nowadays many people would discuss and would not be thought any the worse of for discussing. But it is one thing to discuss a particular subject; it is quite another thing to write about it in the way in which these books, which unfortunately I have had to look at for the purposes of this appeal, deal with it. It seems to me idle to contend that these books are not of the tendency which Cockburn C.J. described in 1868. All I can say, so far as mitigation is concerned in this case, is that it seems to us that the appellants have been trying to sail as near to the wind as they possibly can, and they find that they have now gone too near.

The matter I desire more especially to say a word about with regard to this case is a matter of law. It appears that in the

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course of the trial a large number of other books were produced, and the jury were asked to look at them to enable them to decide whether the books in question were obscene. That seems to me to be absolutely wrong. In the course of the argument the Registrar has handed to me a report of GALLETLY v. LAIRD 1953 S.C. (J.) 16, in which matters relating to obscene literature were discussed. In that case the prosecutions were under a Police Act of Glasgow, but the principles which the court was laying down there are the same as those applicable here. The Lord Justice-General (Lord Cooper), who gave the leading judgment, said at p. 26: "I am not dismayed by the idea that the opinion of the magistrate before whom the case is brought is virtually determinative of the question whether the books or pictures libelled are or not indecent or obscene. Once it is understood that the emphasis falls to be laid upon the second of the elements defined above, it seems to me to be not only intelligible but inevitable that the character of the offending books or pictures should be ascertained by the only method by which such a fact can be ascertained, namely, by reading the books or looking at the pictures. The book or picture itself provides the best evidence of its own indecency or obscenity or of the absence of such qualities; and if in any case the magistrate's decision is challenged, the only method by which an appellate tribunal could determine whether the magistrate was entitled to reach the conclusion which he did would be by examining the book or picture, not with a view to re-trying the case but solely with a view to discovering whether they revealed evidence on which a reasonable magistrate would be entitled to condemn them as indecent or obscene." Later on, and I hope that this will be noticed, because, in our opinion, it states the law equally in England as it is in Scotland, he says (at p. 27): "The magistrate disallowed cross-examination by the complainer's solicitor and positive evidence tendered for the defence designed to show that books other than those referred to in the complaint circulated freely in Paisley and were available in the local

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public library, the suggestion apparently being that these other books were not materially different in character from those complained of. I consider that the magistrate's ruling was right. The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books, or listening to the opinions of other people with regard to these other books."

From time to time questions have been raised with regard to prosecutions relating to indecent literature on the law with regard to evidence of other literature by way of comparison, and so forth. The opinion of the High Court of Justiciary as delivered by the Lord Justice-General in the case to which I have just referred puts the matter, in our opinion, as well as it can possibly be put, and this court desires to adopt every word of it. It will be understood, I hope, in future where there are these prosecutions, whether they are brought under section 1 of the Obscene Publications Act, 1857, or for the offence of publishing an obscene libel, that that is the law, and it is to be regarded equally as the law in this country as it is in Scotland.

As I have said, the only possible ground of criticism is that the learned Recorder's summing-up put the matter strongly, but we cannot say that there was a misdirection of the jury, though it would have been better if he had used in some places expressions other than those he did use. But he did leave the issue to the jury, and having as an appellate court examined these books in the way to which the Lord Justice-General refers, it seems to us that if the jury had returned a different verdict, although we could not have interfered with it, we could fairly have said it was a perverse verdict. Accordingly, this appeal is dismissed.

With regard to the sentences, the learned Recorder took the view that this was a serious case and deserving of a sentence of imprisonment. It is high time that the publication of this

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stuff was stopped and stopped in such a way as will indicate to other persons offending in like manner the view of the court. We cannot say that the sentences passed by the learned Recorder in any way erred in principle, and therefore the appeals against sentence are also dismissed.

Appeals dismissed.

Solicitors : Gerald Samuels & Co., for the second, fourth and fifth appellants; Lewis & Lewis & Gisbourne & Co., for the first and third appellants.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PEARCE

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ALFRED JAMES SEYMOUR

Indictment—Evidence Consistent with both Larceny and Receiving —Counts for both to be Included—Conviction on One Count— Jury to be Discharged from Giving Verdict on Other.

Where it is proved that property has been stolen and that very soon after the stealing the prisoner has been found in possession of it, it is open to the jury to find the prisoner guilty of larceny, and they should be so directed.

LOUGHLIN (1951) 35 Cr.App.R. 69, applied.

In cases where the evidence is as consistent with larceny as with receiving, the indictment should contain counts for both offences. The jury should be directed that it is for them to decide whether the prisoner was the thief or whether he received the property from the thief and should be reminded that a man cannot receive property from himself. If the jury convict on one of these alternative counts, they should be discharged from giving a verdict on the other.

CHRIST (1951) 35 Cr.App.R. 76, applied.

Appeal against conviction.

The appellant was convicted at Reading Quarter Sessions on January 14, 1954, of receiving a gun knowing it to be

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stolen, and was sentenced by the Recorder to three years' imprisonment.

No count for larceny was included in the indictment. The evidence showed that the gun was stolen from a hut on an allotment and that the appellant was in possession of it a few days after its disappearance.

F. L. Clark, for the appellant:

On the evidence it would have been open to the jury to find the appellant guilty of larceny of the gun, as, assuming the identity of the gun to have been established, there was evidence that the appellant was in possession of it soon after the theft (LOUGHLIN (1951) 35 Cr.App.R. 169), but that would have been possible only if there had been in the indictment a count alleging larceny. No such count was included in the indictment in the present case, and it was not open to the jury to say that, although the charge established was really larceny, they would none the less convict of receiving. The Recorder explained to the jury the elements of receiving, but did not deal with the position that would arise if the jury should think that the offence established was that of larceny.

K. Jones for the Crown:

It is conceded that the Recorder did not deal with the position, but the conviction can be supported on the ground that there was evidence sufficient to justify a verdict of receiving.

THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Recorder of Reading of receiving a gun knowing it to have been stolen, and was sentenced to three years' imprisonment. That he was a guilty man in the sense that he was in guilty possession of the gun there is no doubt, but a prisoner is always entitled to the benefit of a technical point if he can find one, and his learned counsel, Mr. Clark, who defended him and had an uncommonly hard task, saw that there was a technical point here and took it, as it was his duty to do.

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The point is this: There is a tendency nowadays which we have tried to correct in two or three cases, to which I will refer in a moment, to think that if there is no positive evidence that the prisoner stole the goods, for instance, if no one saw him go into the shop where the goods were or saw him running away or no finger prints were found, the fact that he is found in possession of stolen property so shortly after it is stolen that it can be fairly said that he is in recent possession justifies a verdict of receiving only and not of stealing. In LOUGHLIN (1951) 35 Cr.App.R 69, the headnote is as follows: "Where it is proved that premises have been broken into and property stolen therefrom, and that very soon after the breaking the prisoner has been found in possession of that property, it is open to the jury to find the prisoner guilty of breaking and entering, and the jury should be so directed." The jury in that case had been directed that they should find him guilty of receiving only, and we quashed the conviction. Where it is proved that property has been stolen and that very soon after the stealing the prisoner has been found in possession of the property, it is open to the jury to find the prisoner guilty of stealing, and the jury should be so directed. I have repeated the substance of the headnote in order to deal with larceny and not breaking and entering.

It is necessary in cases of receiving that a jury should be directed that they must be satisfied that the prisoner received the property from somebody else. It may very likely be that it cannot be said who the other person, the thief, was. Take a common case. Supposing some stolen property is found in the possession of a shopkeeper who deals in that particular kind of property, the jury are entitled to say: "He did not steal the property himself; we think he is a fence, he deals in that kind of property," and they are entitled to come to the conclusion that he has bought the property from the thief. But there are a great many cases where anybody who applies his mind to the case cannot have any doubt that the person found in possession of the property is the thief. If he is the

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thief, he cannot be found guilty of receiving, because a man cannot receive property from himself, but must receive it from somebody else.

In this case, for some reason or another which I do not at all understand, the indictment charged receiving only. The evidence was that on the 7th or 8th November, 1953, a Belgian folding gun, that is to say, a gun which folds up and then goes conveniently into a poacher's pocket, was stolen from a hut on an allotment. The next thing known about that gun was that it was found in the possession of the appellant, a comparatively few days after its disappearance, within such a time that the doctrine of recent possession could be applied to it. He was charged only with receiving, and Mr. Clark on his behalf put forward the case: That the gun of which he was seen to be in possession was not the gun stolen. The jury rejected that; the evidence was overwhelming that it was the gun stolen. As he was in possession of this gun a few days after the stealing, Mr. Clark put forward the alternative contention: "You may come to the conclusion that he was the thief, and if he was the thief you cannot find him guilty on this indictment, which charges him with receiving only."

The Recorder did not sum up the case satisfactorily to the jury. He thought the appellant was a thoroughly dishonest man, but it was necessary that he should be convicted of the right offence. In our opinion the right charge in this case would have been one of larceny. The Recorder, having put Mr. Clark's case to the jury, said: "Well, members of the jury, there is no evidence before you that he stole the gun, except, maybe, that it was in his possession. He was not seen near the premises, and what is more, of course, you are entitled to take at its face value the statement that he made to Mr. Green, that his stepson had received it"—the statement he had made to Mr. Green was that his stepson had received another gun, not the folding gun at all. Then the Recorder went on to say: "As there has been no explanation by the

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prisoner of how he came by that stolen gun, you will probably have little difficulty in drawing the inference that he knew, when that gun came into his possession, that it was stolen property." That is simply a direction and a quite proper direction, as far as it goes, on receiving.

The court desires to lay this down: In cases where the evidence is as consistent with stealing as with receiving, the indictment ought to contain a count for stealing and a count for receiving. The jury should then be directed that it is for them to come to the conclusion whether the prisoner was the thief or whether he received the property from the thief, and should be reminded that a man cannot receive from himself. Then, to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the count for stealing. Equally, if they come to the conclusion that it is a case of stealing, they should be discharged from giving a verdict on the count for receiving. Sometimes a difficulty has arisen. We have had to quash a conviction, say, for receiving and the court has come to the conclusion that the evidence showed stealing and not receiving. If a verdict has been returned on the count for stealing, this court cannot substitute for the verdict of receiving a verdict of stealing. If, however, the jury are discharged from giving a verdict on the count for stealing, and if this court comes to the conclusion that the proper verdict is stealing and not receiving, they can alter the verdict under section 5 (2) of the Criminal Appeal Act, 1907. In this case we cannot alter the verdict from receiving to stealing because there was no charge of stealing in the indictment. We can make the alteration only if we quash the conviction on one count, but think that the evidence supports a conviction on another count. If there is no other count, we cannot alter the verdict. This question has come before this court on quite a number of occasions, not only in LOUGHLIN'S case (*supra*) but also in the case of CHRIST (1951) 35 Cr.App.R. 76, and I hope attention will be called

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to this matter. It is much better to put into an indictment, as a rule, both counts, although it very often happens that, as the case develops, it becomes a case either of stealing or receiving only. There was a case a short time ago—MELVIN AND EDEN (1953) 37 Cr.App.R. 1—in which this court was put into a grave difficulty. There had been a very serious burglary indeed, and the prisoners were caught with a lorry on which the stolen property was, and for some reason or another, the jury found them Not Guilty of stealing but Guilty of receiving. The evidence was that the prisoners stole the property, but we could not alter the verdict because there was a verdict of Not Guilty of stealing. Therefore, while it is desirable that the two counts should be included in the indictment, the jury should be told in cases where the evidence is equally consistent with stealing or receiving, that it is for them to come to the conclusion which is the right verdict, and if they find a verdict of Guilty on one count, they should be discharged from giving a verdict on the other count. Then the difficulty will not arise.

In this case, although it is a pity that a guilty man should escape the consequences of his crime, the conviction must be quashed.

Conviction quashed.

Solicitors: Dennis Berry & Co., Reading, for the appellant; Sheppard & Fullbrook, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

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MICHAEL DENNIS McCARTHY

Murder—Provocation—Drunkenness—Summing-up.

Apart from a man being in such a complete state of intoxication as would make him incapable of forming the requisite intent, drunkenness which may lead a man to attack another in a manner in which no reasonable sober man would do cannot be a matter of defence on a charge of murder, and cannot be relied on as provocation reducing the crime to manslaughter.

THOMAS (1837) 7 C. & P. 815, not followed.

DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD, 14 Cr.App.R. 159; [1920] A.C. 479, MANCINI, 28 Cr.App.R. 65; [1942] A.C. 1 and HOLMES, 31 Cr.App.R. 123; [1946] A.C. 588, applied.

Appeal against conviction (on certificate).

The appellant was convicted at Carmarthenshire Assizes on March 15, 1954, of murder and was sentenced by Havers J. to death.

The appellant, who had been drinking on an empty stomach, got off a bus in which he and the deceased Rees had been travelling and turned up a side road, the surface of which was rough and stony. On that road Rees was found dead, his skull being fractured in two or three places and his face badly injured. The medical evidence was to the effect that the injuries from which Rees died could not have been caused by a single blow, but must have been caused by repeated acts of violence. The appellant, after telling at first a story suggesting that Rees had been knocked down by a car, later said that he had gone up the side road to relieve himself and that Rees had indecently assaulted him and invited him to commit an unnatural offence, which, he said, so

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provoked him that he " went raging," hit Rees and bumped his head on the ground. There was nothing to support this allegation apart from the appellant's own evidence.

The judge directed the jury that, if they were of the opinion that the assault and invitation already referred to were made, those were acts which would constitute provocation, and that they must consider whether in all the circumstances they constituted provocation sufficient to reduce the crime from murder to manslaughter; but that the fact that the appellant was the worse for drink and consequently might be more excitable and liable to lose his self-control if provoked could not be considered by the jury, the test to be applied being whether a reasonable person, in consequence of the provocation received, could be driven through transport of passion and loss of self-control to a degree and method and continuance of violence which produced the death.

Havers J. gave a certificate for appeal under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether his ruling on the law relating to provocation was correct.

Elwyn Jones Q.C. (*Alun T. Davies* with him), for the appellant:

The judge misdirected the jury in telling them that they were not entitled on the facts of the case to take into consideration the fact that the appellant was under the influence of drink. [THE LORD CHIEF JUSTICE: You must deal with the nature of the assault which caused the death.] The nature of the assault was, admittedly, one of the questions which the jury had to consider, but they should also have been reminded of the extent to which the appellant was under the influence of drink. A violent reaction to provocation which in a sober man might be inconsistent with an innocent mind might be consistent with an innocent mind in the case of drunkenness: THOMAS (1837) 7 C. & P. 815. In the present case the element of drunkenness was wholly excluded by the judge. A drunken man may more easily be provoked than

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a sober man, and it was for the jury to consider whether the acts done by the appellant were done in consequence of the provocation which he had received or not. In a case where there are issues of provocation and drunkenness, the judge should not keep them in separate compartments. [THE LORD CHIEF JUSTICE: The judge did direct the jury that, if they accepted the appellant's story, there were matters which would amount to provocation. The real issue is whether the acts of the appellant bore any relation to the provocation]. [PEARSON J.: At some stage the objective test must be applied. Was the provocation sufficient to provoke the average man to use such violence as was used? The effect of intoxication could have no bearing on that test]. It is conceded that the test of the ordinary reasonable man is the one generally to be applied. [He referred to LESBINI, 11 Cr.App.R. 7; [1914] 3 K.B. 1116 and HOLMES, 31 Cr.App.R. 123; [1946] A.C. 588]. Different considerations, however, apply where the issue of drunkenness is raised. [He referred also to DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD, 14 Cr.App.R. 159; [1920] A.C. 479]. With regard to the acts of the appellant, it is submitted that there was an entire absence of motive or of any reasonable explanation other than that of a homosexual assault committed by the deceased on the appellant.

H. Edmund Davies Q.C., and *Campbell Prosser* for the Crown were not called on to argue.

THE LORD CHIEF JUSTICE: The question raised by the appeal is one on which writers of textbooks regard the law to be in a state of doubt. The appeal will be dismissed but, in view of the importance of the case, the court will give its reasons for its decision at a later date.

Cur. adv. vult.

May 3rd. The judgment of the court was read by

THE LORD CHIEF JUSTICE: The appellant was convicted at the last assizes for the County of Carmarthen before Havers

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J. for the murder of Sidney Rees and now appeals on the certificate of the learned judge given in order that this court might consider whether the direction he gave to the jury was correct, namely, that they were not entitled to consider the fact that the accused was the worse for drink (if the jury found that he was) and consequently might be more excitable and liable to lose his self-control if provoked, and whether the accused was the worse for drink or not, the test to be applied was whether a reasonable person, in consequence of the provocation received, could be driven through transport of passion and loss of self-control to the degree and method and continuance of violence which produced the death.

The facts can be stated quite shortly. On the night in question the appellant, who had undoubtedly had a considerable amount of drink, got off a bus in which he had been riding and in which the deceased was also a passenger and went some little way with him. He turned up a side road, the surface of which was rough and stony, and on that road Rees was found by a neighbour lying dead. His skull was fractured in three or four places and his face badly injured; and the case for the prosecution was that the appellant had knocked Rees down and afterwards beat his face or head on the surface of the road thereby causing shocking injuries. When the appellant was interviewed by the police as the man who was known to have been last in the company of Rees, he asserted that he had seen a car coming fast down the road, obviously intending to suggest that it was that car which knocked Rees down and killed him. He afterwards altered the story and in his defence stated that he had gone up the side road to relieve himself, that Rees had there got hold of his penis and, on being pushed away, invited the appellant to commit sodomy with him. This, he said, so provoked him that he " went raging " and hit him, after which his memory was vague, but he did admit that he remembered catching hold of the deceased man's ears and bumping his head on the ground. It is only fair to the memory of the deceased man

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to say that there was nothing to support this allegation other than the appellant's own evidence and the learned trial judge has informed this court that, having regard to the respective size and build of the two men, the story was at least improbable. The medical evidence was clear that the injuries from which the deceased man died could not have been caused by a single blow but must have been caused by repeated acts of violence. The learned judge directed the jury that, if they were of opinion that the assault and the invitation to which we have referred were made, those were acts which could in law constitute provocation and the jury then had to consider whether in all the circumstances of the case they constituted provocation sufficient to reduce the crime from murder to manslaughter. He then went on to give the jury the direction mentioned above in respect of which he granted the certificate.

Now in this case it might be enough to say that considering the learned judge clearly left to the jury that, whether the appellant was drunk or sober, the assault and invitation were of a nature which could amount to provocation in law, the only question for the jury was whether the violence used by the appellant as a result of the provocation could possibly be excusable, as it is undoubted law that the violence used must have some reasonable relation to the provocation. While this provocation would no doubt have excused (when we say " excused " we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one, it could not have justified the infliction of such injuries as to cause three or four fractures of the skull and the beating of the man's head on a stony road. But as the question of how far drunkenness may be taken into account in considering whether the offence can be reduced from murder to manslaughter not infrequently arises and has been treated in some of the textbooks as a matter on which the law is not clear, we propose to consider whether the direction given by the learned judge accurately stated the law.

For reasons that will appear later in this judgment we

do not think it is necessary nowadays to consider in detail many of the older cases bearing on the subject. One case often referred to is THOMAS (1837) 7 C. & P. 815; where Parke B. in summing-up to the jury said (at p. 820): "Drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober." But earlier in his charge he had said (at p. 819): "Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder." In MONKHOUSE (1849) 4 Cox 55, at p. 56, Coleridge J. said to a jury: "It is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention." That case, however, was not approved by the House of Lords in DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD, 14 Cr.App.R. 159 at p. 191; [1920] A.C. 479 at pp. 479, 498. Commenting upon that case, the Lord Chancellor said: "The appropriate question seemed to be whether the prisoner was so intoxicated as to be entirely incapable of forming the intent charged, that is, the intent to murder. The words 'unless the intoxication was such as to prevent his restraining himself from committing the act in question' are not to be found in any other judicial direction and cannot in my view be explained unless they were unscientifically used with the object of indicating the defence of insanity" and he then quoted with approval STOPFORD (1879) 11 Cox 643; where Brett J. said: "If he was merely so drunk as to put himself in a passion, drunkenness would be no excuse." In BEARD'S case (*supra*) the House of Lords considered all the cases on the subject of

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drunkenness being regarded as an element which would reduce the crime of murder to manslaughter and stated their conclusions under three heads, the third of which seems to be applicable here, that evidence falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequence of his acts. Reliance is sometimes placed on the case of HOPPER, 11 Cr.App.R. 136; [1915] 2 K.B. 431; where the real point decided by the court was that the defence of manslaughter should have been left to the jury but, in delivering the judgment, Lord Reading did say (11 Cr.App.R. at p. 141; [1915] 2 K.B. at p. 435): "It has also to be borne in mind, although upon this not much reliance can be placed, that there had been much drinking, and the fact that there had been a fight all tended to make the appellant lose control of himself at the critical moment when he fired the rifle." But at the present day we have the assistance not only of BEARD'S case (*supra*) but of two other decisions of the House of Lords, namely MANCINI, 28 Cr.App.R. 65; [1942] A.C. 1 and HOLMES, 31 Cr.App.R. 123; [1946] A.C. 588. In MANCINI the Lord Chancellor, in stating the opinion of the House said (28 Cr.App.R. at p. 74; [1942] A.C. at p. 9): "It is not all provocation that will reduce the crime of murder to manslaughter. . . . The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in LESBINI, 11 Cr.App.R. 7; [1914] 3 K.B. 1116; so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort,

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in the heat of passion induced by provocation, by a simple blow is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter." In HOLMES (*supra*) the same Lord Chancellor said (31 Cr.App.R. at p. 138; [1946] A.C. at p. 597): " The distinction, therefore, is between asking: ' Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did? ' (which is for the judge to rule) and, assuming that the judge's ruling is in the affirmative, asking the jury: ' Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did? '." We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication. It may be that an excitable, pugnacious or intoxicated person may be more easily provoked than a man of quiet or phlegmatic disposition, but the former cannot rely upon his excitable state of mind if the violence used is beyond that which a reasonable, or as we may perhaps say an average, person would use to repel an act which can in law be regarded as provocation. No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury and what no doubt would govern their opinion would be the nature of the retaliation used by the provoked person. If a man who is provoked retaliates with a blow from his fist on another grown man, a jury may well consider, and probably would, that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with the fist. It would be quite another thing, however, if the person provoked not only struck the man but continued to rain blows upon him or to beat his head on the

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ground, as happened in this case and as the accused apparently did in the case of THOMAS (*supra*) to which we have referred above. In view of the three decisions of the House of Lords to which we have referred, it is in our opinion now settled that, apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results. For these reasons we are of opinion that the direction given by the learned judge was correct and it is for these reasons that we have already dismissed the appeal.

Appeal dismissed

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HALLETT AND MR. JUSTICE PEARSON

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WILLIAM JOHN TOMLIN

Embezzlement—Fraudulent Conversion—General Deficiency—When Properly Charged.

On a charge of embezzlement or fraudulent conversion, in the ordinary case, where it is possible to trace the individual items and to prove an embezzlement or conversion of individual property or money, the aggregate of the individual items should not be included in a count alleging a general deficiency; but where the individual items cannot be traced, if the evidence for the prosecution makes it clear that there has been an embezzlement or fraudulent conversion of either the whole or part of a general balance at one time, it is proper to charge the embezzlement or fraudulent conversion, as the case may be, of a general balance on a day between specified dates.

LAWSON (1952) 36 Cr.App.R. 30, approved.

BALLS (1871) 1 C.C.R. 328, applied.

MORRIS (1933) 24 Cr.App.R. 105, commented on.

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Appeal against conviction (on certificate).

The appellant was convicted at Hastings Quarter Sessions on March 16, 1954, of embezzlement and was sentenced by the Recorder to seven months' imprisonment.

The indictment contained five counts. The appellant was convicted on counts 1 and 3, each of which charged embezzlement, and on count 5 which charged falsification of accounts. He was acquitted on count 2, which charged embezzlement, and on count 4, which charged falsification of accounts. He appealed against conviction on count 1 only, which alleged that, on a day unknown between March 14, 1953, and September 26, 1953, being servant to one Reynolds, he fraudulently embezzled the sum of £420 15s. 3d. in money received by him for or on account of the said Reynolds, his employer. The Recorder gave a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether the first count was bad in law as alleging "embezzlement of a lump sum or general deficiency arising from misappropriation of small unidentifiable sums over a number of months."

The appellant had been employed for many years in a shoe shop at Hastings, and was manager when Reynolds bought the shop in the middle of 1952. Reynolds retained the appellant's services. In March 1953 a careful check of stock was made, and, certain records having been kept in the meantime, an even fuller check was made in September 1953. The latter check revealed that goods to the value of £420 15s. 3d. had disappeared between the two stocktakings. No proceeds from these goods had ever been paid over by the appellant to or for Reynolds, nor were any proceeds still available in the appellant's hands. Later the appellant, while denying dishonesty, admitted to the police that there was a deficiency, and subsequently made restitution.

Neil Lawson, for the appellant:

A count which charges a general deficiency is, on the authorities, bad in law. The early authorities are somewhat

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inconsistent in the view which they take. In Russell on *Crime*, 10th ed., Vol. II, at p. 1279, it is stated that GROVE (1835) 7 C. & P. 135, in which such a count was held to be good, cannot be supported "in view of the opinion expressed by Bolland B. in the later case of JONES (1837) 7 C. & P. 834." It is difficult to understand precisely to what the learned author is referring, because Bolland B. does not appear to have expressed any opinion on the matter in JONES (*supra*). None the less, certainly since the establishment of the Court of Criminal Appeal, counts alleging a general deficiency or balance have been disapproved. It is stated as an entirely unqualified proposition in MORRIS (1933) 24 Cr.App.R. 105, at p. 107, that such a count is bad, and that decision has never been overruled by any subsequent decision of the court. Moreover, it is consistent with the view expressed by Avory J. in SHEAF (1925) 19 Cr.App.R. 46, at p. 49. The difficulty arises from the recent decision of Lynskey J. at assizes in LAWSON (1952) 36 Cr.App.R. 30. That decision was based largely on the decision of the Court for Crown Cases Reserved in BALLS (1871) 1 C.C.R. 328, but the facts there were different, because there was a definite accounting period at which it became the duty of the prisoner to hand over the aggregate of a number of individual sums. The matter was mooted, but not decided, in the Courts-Martial Appeal Court in TUCKER (1952) 36 Cr. App.R. 192, at p. 197, but it was never suggested in that case that MORRIS (supra) had been wrongly decided.

Wilfrid Fordham, for the Crown:

In the present case the count alleging a general deficiency was good in law. It was obviously impossible to prove specific embezzlements on specific dates, but there was ample evidence of a general deficiency at the end of a definite period. The case falls, therefore, precisely within the principle laid down in LAWSON (*supra*), approving the earlier decision in BALLS (*supra*). The court is invited to say that these cases were rightly decided and correctly enunciate the principle which

should now be followed, and that the isolated dictum in MORRIS (*supra*) is too wide.

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Cur. adv. vult.

May 3. The judgment of the court (prepared by Hallett J.) was read by:—

PEARSON J.: This appellant was tried on March 16, 1954, before the learned Recorder of Hastings upon an indictment containing five counts, whereof the first three counts charged him with embezzlement and the last two counts with falsification of accounts. The charge of falsification in the fourth count was connected with the charge of embezzlement in the second count, and upon those two counts the jury, being dissatisfied with the evidence, acquitted the appellant. The charge of falsification in the fifth count was connected with the charge of embezzlement in the third count, and upon those two counts the jury found the appellant guilty and he does not appeal. This court is therefore concerned only with the first count, which alleged that the appellant on a day unknown between March 14, 1953, and September 26, 1953, being servant to one Reynolds, fraudulently embezzled the sum of £420 15s. 3d. in money received by him for or on account of the said Reynolds his employer.

The first ground of appeal is that there was no evidence of embezzlement to go to the jury on the said count, and the third ground of appeal alleges misdirection by the Recorder in three respects. We have considered these grounds and only think it necessary to say that we find no substance in them. The second ground of appeal raises the point of law which the Recorder overruled, but has certified as fit for the consideration of this court, namely, that the first count was bad in law as alleging a general deficiency of moneys, or, to use the Recorder's language, "embezzlement of a lump sum or general deficiency arising from misappropriation of small unidentifiable sums over a number of months."

The cases cited upon this point in the textbooks are,

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perhaps, not easily reconcilable, and, although the legal position has, as we think, been illuminated by the recent ruling of Lynskey J. in LAWSON (1952) 36 Cr.App.R. 30, a judgment of this court thereon may be helpful.

The facts of the case, so far as relevant, are as follows:— The appellant had been employed for many years in a shoe shop at Hastings and was the manager in the middle of 1952 when a Mr. Reynolds bought the shop and retained his services. In March 1953 a deficiency of stock was suspected and accordingly a careful check was then taken. In September 1953, certain records having been kept in the meantime, another check was taken which extended over about four days. This later check revealed that between the two stocktakings goods to the value of £420 15s. 3d. had, to use a neutral word, gone and that no proceeds from those goods had ever been paid over by the appellant to or for Mr. Reynolds or were still available in the hands of the appellant for Mr. Reynolds. The appellant later, whilst denying dishonesty on his part, admitted to the police that there was a deficiency and subsequently made restitution. He did not suggest that either stocktaking had been faulty, or that there had been any loss of goods or money through a casualty, such as a theft by a third party. His only suggested explanation was that the deliveries of goods during the period between the two stocktakings might have been less than the invoices represented, and this explanation, which was mentioned to the jury in the summing-up, was clearly rejected by them.

The Recorder plainly directed the jury that they could find the appellant guilty on the first count only if they were satisfied that he had dishonestly embezzled the money which he got from customers for the shoes which had apparently left the shop, and that if they thought he might have stolen the shoes, as distinct from stealing the proceeds of their sale, they must acquit the appellant. The verdict of the jury thus involves that the appellant had dishonestly embezzled the whole or part of the total sum of £420 15s. 3d. which he had

received for or on account of his employer during the period between the two stocktakings from customers who bought shoes which had gone during that period. It was clearly impossible for the prosecution to say that a particular pair of missing shoes had been sold on a particular day, or to a particular customer, or for a particular sum which had then been dishonestly placed in the appellant's own pocket. The question for this court is whether in such circumstances a count in the form of this first count is bad in point of law.

Where separate offences can be charged in separate counts, the court regards as improper an "omnibus" count in an indictment charging an aggregate of offences over a long period (see, for instance, ROBERTSON (1936) 25 Cr.App.R. 208), but here no splitting up of the aggregate sum was possible. In GROVE (1835) 7 C. & P. 635, the prisoner admitted a deficit of about £900, but the prosecution could not prove from whom the money was received or in what amounts or at what time. None the less the court, by a majority, upheld the conviction. It is suggested in Russell on *Crime*, 10th ed., Vol. 2, at p. 1279, that "in view of the opinion expressed by Bolland B. in the later case of JONES (1837) 7 C. & P. 834, GROVE (*supra*) would seem to be of no authority," but Mr. Lawson has been unable to point out, and we have been unable to find, any passage in the judgment of Bolland B. which supports this suggestion. The ruling of Alderson B. in LLOYD-JONES (1838) 8 C. & P. 288, is not binding upon us, and such reports of circuit cases do not disclose either the facts or the reasons sufficiently to make them satisfactory authorities. The same observation applies to CHAPMAN (1843) 1 C. & K. 119. In LAMBERT (1847) 2 Cox 309, Erle J. took a contrary view, remarking at p. 310: "There would be constant failure of justice if I were to decide otherwise, since it is impossible, in cases like the present where a number of different amounts of money have been received, to specify which sum or sums, or the parts of which sum or sums, have been embezzled." We feel that, if the technical rule alleged on behalf of the

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appellant in fact prevails, justice will in truth, in many cases, be defeated.

In our judgment, however, the case of BALLS (1871) 1 C.C.R. 328, is inconsistent with the supposed rule. This was the unanimous decision of a very strong court, consisting of Cockburn C.J., Willes, Mellor, Montague Smith J.J. and Channell B., and it is to be observed that counsel for the prosecution was not even called upon. Under section 71 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), only three acts of embezzlement could be charged or proved under one indictment, and then only if committed within six months. Accordingly there was strong ground in 1871 for contending that where a number of small sums were separately embezzled one could not add them all together and treat it as one embezzlement of the whole, yet in BALLS' case (*supra*) the first count charged the embezzlement on December 5, of the aggregate of ten different payments made by ten different persons during the preceding week, and similarly the second count related to the aggregate of ten payments and the third count to the aggregate of eleven payments.

In the present case we feel no doubt that when the stock-taking took place in September, and shoes to the value of £420 15s. 3d. were found, as the jury's verdict implies, to have been sold, the appellant was under a duty to account then for the proceeds of sale, if he had not done so before, and the fact that he may have been also under a duty to account, week by week, for the proceeds received during each week and might, as in BALLS (*supra*) "have been indicted for embezzling any of the separate small sums received by him," does not prevent him from being indicted for embezzling the aggregate of those sums.

The decision in BALLS' case (*supra*) is binding upon us, unless the facts are distinguishable, and we can see no valid distinction. On the contrary, evidence to establish the thirty-one separate payments was apparently available in that case, so that there was less necessity than here for the aggregation.

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In SHEAF (1925) 19 Cr.App.R. 46, the conviction for fraudulent conversion was quashed, upon the ground that the vital question of entrustment had never been left to the jury, but the question of charging the embezzlement of a general deficiency was mentioned by Avory J. at the bottom of p. 49. We find nothing in this passage inconsistent with the decision in BALLS' case (*supra*) or with our view that we should here follow BALLS' case (*supra*). We agree with the Recorder that it was the appellant's duty, when stock was taken, to account for the money that he had received for stock which he had disposed of, assuming, of course, that he had not accounted already.

The judgment in MORRIS (1933) 24 Cr.App.R. 105, contains only one sentence, at p. 107, which deals with the question now under consideration, and no reasons appear to have been given or cases cited either in the argument or in the judgment for the proposition affirmed. In particular BALLS' case (*supra*) was apparently not mentioned. In these circumstances Lynskey J. in LAWSON (*supra*) thought it right to hold that, if the evidence for the prosecution makes it clear that there has been a fraudulent conversion of either the whole or part of a general balance at one time, it is proper to charge the conversion of a general balance on a day between the specified dates. Having reviewed the authorities and had the advantage of a most careful and thorough argument by Mr. Neil Lawson for the appellant, we have no doubt that the ruling of Lynskey J. in LAWSON'S case (*supra*) was correct and we can see no valid distinction between that case and the present case as regards the point in question. On the view taken by the jury there was clearly a conversion, or rather an embezzlement, of one part of the aggregate at one time.

We have been referred to the courts-martial case of TUCKER (1952) 36 Cr.App.R. 192, but, as appears at p. 197, that court did not find it necessary to decide whether in that case it was proper to base the charge on an alleged general deficiency.

We desire to make it plain in conclusion, agreeing therein

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with Lynskey J., that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency.

What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice.

The appeal is dismissed.

Appeal dismissed

Solicitors: Herington, Willings & Penry-Davey, Hastings, for the appellant; N. P. Lester, Town Clerk, Hastings, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE HAVERS

1954
May 24

THOMAS McNALLY

Trial—Withdrawal of Plea—Discretion of Judge.

The question whether a plea of Guilty is to be withdrawn before sentence is entirely one for the discretion of the judge.

PLUMMER [1902] 2 K.B. 339, followed.

Once sentence has been pronounced, the judge has no power to allow a plea to be withdrawn.

SELL (1840) 9 C. & P. 348, followed.

BLAKEMORE (1948) 33 Cr.App.R. 49, dissented from.

Discretion of the judge in refusing to allow a prisoner to withdraw his plea held to have been properly exercised in the circumstances of the particular case, although the judge had not asked the prisoner on what grounds he desired to withdraw his plea.

Appeal against conviction.

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Goddard L.C.J., Hilbery J., Havers J.

The appellant pleaded Guilty at Manchester Assizes on March 2, 1954, to warehousebreaking and larceny and housebreaking and larceny, and on March 17, 1954, was sentenced by Jones J. to seven years' imprisonment.

The appellant was indicted along with four other prisoners, one of whom named Stubbs pleaded Not Guilty and the rest Guilty. The appellant pleaded Guilty without any qualification, and had already at the magistrates' court, in answer to the statutory caution, said: "I plead Guilty." Sentence on the four prisoners who had pleaded Guilty was postponed. After Stubbs had been tried, convicted and sentenced, the appellant was brought up for sentence and then said that he wanted to change his plea. He gave no reason for wanting to do so, and he was not asked by the judge on what ground he wanted to do so. The judge refused to allow the plea to be withdrawn.

The appellant, in his notice of appeal, did not specify any ground on which he had desired to withdraw his plea.

T.R. Fitzwalter Butler, for the appellant:

A prisoner may, by leave of the judge, withdraw his plea of Guilty at any time before the sentence: PLUMMER [1902] 2 K.B. 339; and if BLAKEMORE (1948) 33 Cr.App.R. 49, was rightly decided, in an exceptional case, even after sentence. That decision, however, is inconsistent with SELL (1840) 9 C. & P. 348; and CLOUTER (1859) 8 Cox 237; and with the decision of the Court for Crown Cases Reserved in PLUMMER (*supra*). Further, it was cited to the Divisional Court in CAMPBELL, *ex parte* HOY [1953] 1 K.B. 585; a case of purported withdrawal of plea of Guilty after sentence in a magistrates' court, but the Divisional Court appears not to have regarded the principle laid down in the earlier cases as capable of extension. If it became manifest to the judge that a plea of Guilty had been entered under a misapprehension —as, for example, when it becomes apparent that the prisoner

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did not intend to admit all the ingredients of the offence,—it would be the duty of the judge to allow the plea to be withdrawn. It is conceded, however, that this principle has no application to the present case. The general rule is that it is a matter for the discretion of the judge whether he will allow the plea to be withdrawn, and it is conceded that in the present case the matter was entirely one for the judge's discretion; but before a judge can exercise his discretion, he should ask the prisoner on what grounds he desires to withdraw his plea, and if the prisoner advances any grounds, the judge should then consider them and decide whether they are sufficient or not. If the judge, after considering the grounds, decides to refuse the application, he should make it clear that he is exercising his discretion in doing so. These principles, it is submitted, apply *a fortiori* in the case of a prisoner not represented by counsel. The real ground of appeal in the present case is that Jones J. did not exercise his discretion and had no sufficient materials on which he could do so, because he did not seek to discover the appellant's grounds for desiring to withdraw his plea. Even where a judge has exercised his discretion, a convicted person can appeal on the ground that the discretion has been wrongly exercised; but it is conceded that this court will interfere only if it is satisfied that the exercise of the discretion has led to a miscarriage of justice; GRONDOWSKI (1946) 31 Cr.App.R. 116; [1946] K.B. 369; and that that principle cannot apply here.

Sir Noel B. Goldie, Q.C. (*Sidney Smith* with him) for the Crown:

The appellant had no grounds for desiring to withdraw his plea. After entering an unqualified plea of Guilty, he allowed fifteen days to elapse without seeking to change his plea and did so only after Stubbs had been tried and sentenced. Further in his notice of appeal he has not specified any ground whatever.

[He was stopped.]

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Goddard L.C.J., Hilbery J., Havers J.

THE LORD CHIEF JUSTICE: The appellant pleaded Guilty before Jones J. at Manchester Assizes to charges of warehouse-breaking and larceny and housebreaking and larceny for which he was indicted along with certain other prisoners. One of those prisoners named Stubbs pleaded Not Guilty and the rest pleaded Guilty. The case was then put over after the pleas until it was convenient to the court to try the prisoner who had put himself on the country. About fifteen days after the commencement of the Assizes the learned judge tried Stubbs and heard the whole of the facts of the case. The appellant had pleaded Guilty without any qualification and he had also pleaded Guilty before the magistrates, which was the reason why the magistrates would not give him legal aid. He was a man with several convictions. When the learned judge had heard the whole of the facts of the case by reason of the trial of Stubbs, he was in a position to pass sentence. He might have passed sentence on the day on which the appellant pleaded Guilty, but he postponed sentence till he had heard the whole case. When Stubbs had been sentenced, the appellant was put up for sentence, and then said that he wanted to change his plea. He gave no ground for wanting to do so, and the learned judge refused to allow him to change his plea and said he was only trying to make a nuisance of himself, which was obviously true. He did not pretend that he had any defence. He had been caught red-handed in a factory by the police.

We only put this case into the List as an appeal so that the court might have an opportunity of stating perfectly firmly what is the position with regard to a prisoner who desires to change his plea. If a prisoner has pleaded Guilty in circumstances from which the court can see that there is no question of mistake, the court is not bound to allow a prisoner to withdraw his plea. If certain grounds are shown or the court can see that there are sound grounds as, for instance, where a prisoner has pleaded Guilty to a charge of receiving stolen goods and then says: "I pleaded guilty and I

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received them, but I did not know they were stolen," then it becomes entirely a matter of discretion for the learned judge. The most that can be said in this case—and the court is indebted to Mr. Fitzwalter Butler, whom they asked to represent the appellant so that they might have the relevant cases brought before them—is that the learned judge did not say to the appellant: "On what grounds do you want to withdraw your plea?" It is perfectly obvious that he had no grounds. In his notice of appeal he does not suggest that he had any grounds, nor has his learned counsel been able to tell the court any ground on which he wished to withdraw his plea. It is perfectly obvious that, finding heavier sentences were being given than he expected, he wanted, as the learned judge said, to cause trouble, but we cannot say here that the learned judge did not exercise his discretion. He had the whole of the facts before him, and could see that there was no ground for withdrawing the plea.

The court desires to say this: The question whether a plea is to be withdrawn or not is entirely a matter for the learned judge. The judge is not bound to allow it to be withdrawn. If he came to the conclusion that there was a question of mistake or misunderstanding or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt he would allow him to do it. We do not think the case of BLAKEMORE (1948) 33 Cr.App.R. 49; ought to be followed. That was a case in which Byrne J., as he said in wholly exceptional circumstances, allowed a plea to be withdrawn after judgment. Once the sentence has been pronounced there is no power in the court to allow the plea to be withdrawn. That is the effect of the decision in SELL (1840) 9 C. & P. 348; where, after some doubt, the case was mentioned to several of the judges and they decided that once the sentence had been pronounced there was no power in the court to allow the plea to be withdrawn.

In PLUMMER [1902] 2 K.B. 339; a decision of the Court for Crown Cases Reserved, it was stated quite firmly in the

judgment of Wright J., that a plea cannot be changed after judgment. In this case it is true that the appellant asked to withdraw his plea before judgment was given. Directly the appellant pleaded Guilty, the learned judge could have proceeded to judgment, but he waited instead till he had heard the whole facts of the case, and then came to the conclusion that there was no ground for allowing the plea to be withdrawn. We are quite satisfied that the learned judge did exercise his discretion, and accordingly this appeal fails and is dismissed.

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Appeal dismissed.

Solicitor : P. B. Dingle, Town Clerk, Manchester, for the Crown.

CIRCUIT CASE (NORTH-EASTERN CIRCUIT)

BEFORE

MR. JUSTICE PEARSON

R. *v.* MOORE

1954
Mar. 15, 16

Evidence—Competency of Witness—Wife—Husband Charged with Arson of Wife's Property—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 12—*Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 4 (1).

Where a husband is prosecuted by his wife for arson of his wife's property, the wife is, by virtue of section 12 of the Married Women's Property Act, 1882, and section 4 (1) of the Schedule to the Criminal Evidence Act, 1898, a competent witness for the prosecution.

Trial on indictment.

The prisoner, Harry Moore, was charged at Leeds Assizes before Pearson J. and a jury on an indictment containing three counts. In the first count, the Statement of Offence was arson,

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contrary to section 2 of the Malicious Damage Act, 1861, and the Particulars of Offence alleged that the prisoner on November 20, 1953, maliciously set fire to a certain dwelling-house, namely 293, Mount St., Bradford [the property of and] in the occupation of Annie Moore, James Moore, Ann Moore and Edith May Moore being therein. In the second count, the Statement of Offence was arson, contrary to section 3 of the Malicious Damage Act, 1861, and the Particulars of Offence alleged that on the same day the prisoner maliciously set fire to the same dwelling-house. In the third count, the Statement of Offence was arson, contrary to section 7 of the Malicious Damage Act, 1861, and the Particulars of Offence alleged that on the same day the prisoner maliciously set fire to certain curtains [the property of the said Annie Moore] in the same dwelling-house in such circumstances that if the building had thereby been set fire to the offence would have amounted to felony. The words in square brackets were added by way of amendment to the indictment after Pearson J. had given the ruling which is here reported.

When the wife, Annie Moore, was called to give evidence for the prosecution, defending counsel objected to her evidence on the ground that she was not a competent witness against her husband.

J. S. Snowden, for the prosecution.
Barry Payton, for the prisoner.

PEARSON J.: In this case there is a preliminary question on the admissibility of the evidence of the prisoner's wife as a witness for the prosecution. She was called as a witness before the examining magistrates. The indictment alleges offences under section 2, section 3 and section 7 of the Malicious Damage Act, 1861. It is argued on behalf of the prisoner that his wife's evidence is not admissible on the ground that she is neither a competent nor a compellable witness. The prosecution, while not contending that her evidence is essential to their case, desire a decision on the question. I am invited

to assume that it is common ground that the house which was either set on fire or was in danger of being set on fire was in a sense the wife's property, because she held the lease or tenancy of the house.

The starting point is the general rule which I take to be correctly set out in Archbold's *Criminal Pleading, Evidence and Practice*, 33rd ed., p. 497: "At common law, as a general rule, the husband or wife of a prisoner is not a competent witness for the Crown *against* the prisoner." From that general rule there are, in the first place, certain exceptions at common law which I take to be correctly set out at pp. 497 and 498, but none of these exceptions is relied on here. There are also certain statutory exceptions under section 4 (1) of the Criminal Evidence Act, 1898, as it has been amended by subsequent Acts, and reliance is placed by the prosecution on either or both of two of those as being applicable to this case.

The first is section 12 of the Married Women's Property Act, 1882, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935, section 5 and Scheds. I and II, the main provision of which is: "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, as if she were a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort." In my view, the question falls to be decided mainly on the wording of that provision. The criminal proceedings here are to punish an alleged act of arson in respect of the wife's own property, as I assume it to be, and, quite clearly, unless the scope of the words is restricted by some later part of the section, the words "have . . . the same remedies and redress by way of criminal proceedings for the protection and security of her own . . . property" are wide enough to cover this case. Obviously, her property

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requires to be secured against arson as well as against other offences.

It is contended by the defence that the section does not apply on the ground that the prosecution was not by Mrs. Moore. But on the facts before me that appears to be incorrect, because there is a recognisance by Mrs. Moore, the conditions being that she is to appear at the assizes and prefer or cause to be preferred a bill of indictment against the prisoner in respect of the offence in question, namely, arson. On the facts, therefore, it appears that this is a prosecution by her.

It is further contended that the scope of this provision is restricted to larceny and possibly other offences under the Larceny Act, 1916. The matters relied on for that contention on the part of the defence are, in the first place, derived from further words in this section : " In any indictment or other proceeding under this section it shall be sufficient to allege such property to be [the wife's] property. . . ." That is not, in fact, alleged in terms in the present indictment, but the defect can be cured by amendment, as the indictment does refer to the house as being " in the occupation of Annie Moore." Then the section continues : ". . . and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding : Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." The defence stress the wording " unless such property shall have been wrongfully taken by the husband," which certainly tends to suggest that the subject-matter primarily contemplated is an offence under the Larceny Act, or some similar offence, because the wording is " shall have been wrongfully taken " and not " shall have been wrongfully taken or

set on fire." That is an argument which, I think, has some merit, but I do not think one can assume that the scope of the exception contained in the proviso is necessarily the same as the scope of the main clause. Prima facie, one would expect it to be rather less wide than the scope of the main clause. My view on that is that the main clause should have its proper effect according to the meaning of the words and does, therefore, include this case of arson. The other matters relied on in support of that contention are, first, section 36 of the Larceny Act, 1916, which refers only to offences under that Act, but the answer seems to me to be that any section of the Larceny Act, 1916, would naturally refer only to offences under that Act. The point would have been much stronger if there had been some other Act relating to arson which did not contain a provision similar to section 36 of the Larceny Act, 1916, but I am not aware of any such Act relating to arson and no such Act has been cited to me. The present proceeding is brought under the Malicious Damage Act, 1861. Secondly, a case was cited to me, namely, CREAMER (14 Cr.App. R. 19; [1919] 1 K.B. 564, at p. 569) and a passage was cited of the judgment of the court, which in terms refers only to larceny. Darling J. said: "At common law a wife could not commit larceny of her husband's property, but by section 12 and section 16 of the Married Women's Property Act, 1882, it was for the first time made possible to prosecute a wife for stealing her husband's goods. Those sections have been reproduced in section 36 of the Larceny Act, 1916, which provides that no proceedings under the Act shall be taken by a husband against his wife while they are living together, nor while they are living apart as to any act done by the wife while they were living together, unless the property has been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband." But that case was concerned with an indictment for receiving certain money well knowing it to have been stolen, and I do not think that passage in the judgment of the court contains any implication that the provision of section 12 of the Married Women's Property Act,

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1882, was necessarily limited to larceny and kindred offences. There was also cited to me a passage from Eversley on *Domestic Relations*, 6th ed., p. 171: "A special exception was created by the Married Women's Property Act, 1882, and the Married Women's Property Act, 1884, enabling husband or wife to give evidence against each other, on the prosecution of the one by the other for larceny of his or her property committed on desertion." That sentence would certainly seem to convey an implication that the scope of the provision is limited to matters of larceny only, but it is only a short sentence, and, at any rate, section 36 of the Act of 1916 would apply to more than cases of larceny as such. Once more, I think one should come back in the end to the wording of the section itself. As I have said, the main provision primarily governs the decision, and this case falls within that main provision.

There is a further question raised by the defence under section 12 of the Married Women's Property Act, 1882. The proviso states ". . . that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together. . . ." The contention of the defence is that at the material time these people were living together, or, at any rate, that it has not been shown that they were at that time separated. On the evidence which is now before me, I hold that the consortium had ceased and, therefore, that part of the proviso is not applicable.

The prosecution rely on another statutory exception to the general rule I have mentioned, and that is under Schedule I to the Children and Young Persons Act, 1933, because the Criminal Evidence Act, 1898, as amended by section 15 of the Act of 1933, refers to that schedule. Schedule I to the Act of 1933 mentions a number of offences under various sections, and then there is a general clause at the end: "Any other offence involving bodily injury to a child or young person." One of the charges in the present indictment is that the prisoner set fire to a certain house in which three children were at that time. It is suggested, therefore, that the offence charged was one which involved bodily injury to a child or young person.

The wording of the general clause which I have mentioned tends to suggest that, perhaps, it should be read to some extent *ejusdem generis* with the offences which have been previously specified. I have looked at the sections referred to, in so far as they can be found, in Archbold, but they cannot all be found there, and I did not get much help from those other sections one way or the other. I, therefore, think it is reasonable to consider whether, within the reasonable meaning of those words, the offence charged does involve "bodily injury to a child or young person." It seems to me that the answer is "No," for this reason. The prosecution have to prove under that count two things: (i) that the prisoner set fire to the house: (ii) that at the time when he set fire to the house certain persons were therein. It is not necessary for the prosecution to prove "bodily injury to a child or young person," nor that, in the circumstances of this case, it was to be expected that bodily injury would be inflicted on a child or young person. The prosecution would be entitled to succeed even if the defence were able to establish that it was impossible that any bodily injury would be inflicted on any other person. Under the first count I hold that the charge there is not one which involves "bodily injury to a child or young person" within the meaning of that schedule.

For the reasons stated above, under section 12 of the Married Women's Property Act, 1882, and section 4 (1) of the Criminal Evidence Act, 1898, I hold that the evidence is admissible.

[The wife, on being recalled, declined to give evidence. The prisoner was convicted on the first count.]

Solicitors: W. H. Leathem, Town Clerk Bradford, for the Crown; H. Duxbury, Bradford for the defendant.

CIRCUIT CASE (NORTHERN CIRCUIT)

BEFORE

MR. JUSTICE JONES

1954
Mar. 19

R. *v.* R. W. PROFFITT LTD.

Hire-Purchase—" Hire-Purchase Agreement "—Right of Bailee to Purchase—Right " Subject to the Enactment of the Necessary Legislation "—Hire Purchase Act, 1938 (1 *&* 2 *Geo.* 6 *c.* 53), *s.* 21—*Hire-Purchase and Credit Sale Agreements (Control) Order*, 1952 (*S.I.* 1952 *No.* 121), *art.* 1, *Sched.* 2.

By article 1 of the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952 : " A person shall not dispose of any goods to which this order applies in pursuance of a hire-purchase or credit sale agreement entered into after January 31, 1952, unless the requirements specified in the Second Schedule hereto are or have been satisfied in relation to that agreement."

In August, 1952, the defendant company hired a television set and aerial to M. Clause 11 of the agreement provided " If the agreement shall continue in force for the period of two years from the date hereof then the company shall afford the customer the three alternatives following (*a*) subject to the enactment of the necessary legislation, to purchase the above-mentioned television set and the said aerial for the sum of 1s. . . ." The defendant company was charged with disposing of the set in pursuance of a hire-purchase agreement entered into in contravention of the above-mentioned Article, in that the following requirements specified in the Second Schedule to the order had not been satisfied : (i) the agreement failed to state the cash price : (ii) the initial deposit was less than that required by the Schedule ; (iii) the maximum period during which instalments could be paid to comply with the Schedule was less than the period stated in the rental agreement.

Held, that an agreement, to come within the definition of hire-purchase agreement contained in section 21 of the Hire Purchase Act, 1938, must confer an absolute right on the bailee to buy the goods or must be an agreement under which the property in the goods will or may pass to the bailee by virtue of some provision in the agreement ; that, as in the agreement in question the right to buy and the passing of the property

in the goods depended on the contingency of the passing of new legislation, no absolute right to buy was conferred, nor was the alternative requirement fulfilled; and that, accordingly, the agreement was not one of hire-purchase and the company was not guilty of the offence charged.

Trial on indictment.

The defendant company, R. W. Proffitt Ltd., was charged at Manchester Assizes before Jones J. on an indictment containing three counts. Each of the counts related to a different transaction, but the issue in each case was identical. The first count charged the company with disposing of goods contrary to regulation 55 of the Defence (General) Regulations, 1939, the Particulars of Offence being that the company disposed of a television receiving set to Eric James Marsh in pursuance of a hire-purchase agreement entered into in contravention of article 1 of Hire Purchase and Credit Sale Agreements (Control) Order, 1952, in that the requirements specified in the Second Schedule to the order had been satisfied. The three unsatisfied requirements are set out in the headnote.

The agreement in question was headed "Rental of television set and aerial installation." After giving details of the customer, the set, the installation charge and the agreed weekly rental, it continued: "In consideration of the payment of the before-mentioned installation charge and weekly rental R. W. Proffitt Ltd. (hereinafter called 'the company') hereby rent to the customer the television set and aerial installation and hereby undertake to maintain the above-mentioned television set and the said aerial installation in reasonable working order subject [*inter alia*] to the conditions following: — . . . 10. This agreement of rental shall continue in force for the period of two years from the date hereof but may be terminated on the option of the customer at any time after the expiration of the period of thirty weeks from the date hereof, provided the customer shall give to the company one month's notice in writing of his or her intention to terminate this agreement of rental any time after the expiration of the

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said period of thirty weeks. 11. If this agreement shall continue in force for the period of two years from the date hereof then the company shall afford the customer the three alternatives following : (*a*) Subject to the enactment of the necessary legislation, to purchase the above-mentioned television set and the said aerial for the sum of 1s. : (*b*) To renew this rental agreement for a third and fourth year under the same terms and conditions as are contained herein, but at a reduced rental of 5s. 6d. per week : (*c*) To renew this rental agreement for a third and fourth year under the same terms and conditions as are contained herein but excluding the provisions of clause 2 of this agreement. In consideration of the withdrawal of the provision for maintenance the company agrees that the rental charge for the third and fourth years shall be at the rate of 1s. per year." The agreement, which was made in August, 1952, was stamped and signed by both parties.

By section 21 of the Hire-Purchase Act, 1938 : ". . . ' Hire-purchase agreement ' means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, and where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made."

C. T. B. Leigh, for the prosecution.

N. J. Laski Q.C., and *C. N. Glidewell*, for the defendant company.

JONES J. : Members of the jury, hire-purchase agreements take various forms, and the usual one is that of hire with option to purchase. It has been considered advisable that certain restrictions be placed on such agreements. First, in 1938 a statute was passed which imposed certain restrictions, and

since then restrictions have been imposed by various Orders, in particular the Hire-Purchase and Credit Sale Agreements (Control) Order, 1952. [His Lordship read Art. 1 and Sched. 2 of the Order and continued.] The document before you does not comply with several of the requirements of Schedule 2 and the defendants say that it does not comply because it is not a hire-purchase agreement. The prosecution on the other hand say that it is a hire-purchase agreement and that, therefore, it ought to comply. Therefore, the matter for decision is a pure question of law—whether the document is a hire-purchase agreement or not.

No cash price has been stated in this document, nor has the second requirement about the payment of 33⅓ per cent. been carried out, nor is the period during which the instalments may be paid limited to eighteen months. If, therefore, the document is a hire-purchase agreement, it is entirely in breach of the Order and the defendants are liable to be convicted. Before I can allow you to convict, I have to decide and direct you on the point whether it is a hire-purchase agreement or not.

That question is not an easy one, and turns on the construction of clause 11. Does that clause give an option, or is it so restricted that no option to purchase is given? It must be obvious to you that if the words " subject to the enactment of the necessary legislation " are left out, leaving only the words " to purchase the above-mentioned goods for the sum of 1s.," there would be a clear option and the document would be a hire-purchase agreement and ought to comply with the Order. What is the meaning of the words " subject to the enactment of the necessary legislation?" The question is, was the hirer given an option to purchase within the meaning of the definition in section 21 of the Hire-Purchase Act, 1938? In that Act " hire-purchase " is defined as an agreement for the bailment of goods under which the bailee may buy the goods. It cannot be suggested by Mr. Leigh for the Crown that this is an agreement under which the bailee may buy the goods, but he contends that it is an agreement under which

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Jones J.

the property in the goods "will or may pass" to the bailee. He agrees—as, undoubtedly, is the case—that the time when it has to be decided whether under the agreement the property in the goods will or may pass to the bailee is the time when the agreement is made.

I have come to the conclusion that, to render the agreement a hire-purchase agreement, the hirer should then have been given a right to buy the goods if he wished, or there must have been a provision that if the goods might pass to the bailee they might do so only by virtue of some right conferred on him by the agreement. In my view, no such right has been conferred on him, because such right would have been acquired only if new legislation were passed, and there is no certainty when such legislation will be passed or whether it will be passed at all. It seems to me, therefore, that it cannot be said that this is an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee.

In those circumstances, members of the jury, I have come to the conclusion, as a matter of law, that this is not a hire-purchase agreement, and therefore the defendants have not committed any breach of the Order of 1952. Therefore, on my direction, you will find a verdict of Not Guilty.

Verdict, Not Guilty.

Solicitors: Solicitor for the Board of Trade, for the Crown; David Blank, Alexander & Co., Manchester, for the defendant company.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE LYNSKEY

IAN ARTHUR GRANT
KENNETH GILBERT

1954
June 2.

Murder—Common Design to Commit Felony—Felony not Crime in Itself Involving Violence—Preconceived Intention to use Violence to Overcome Resistance.

If several persons embark on an enterprise to commit a felony and have also the preconceived common intention to use violence of any degree, if necessary, for the purpose of overcoming resistance, and death results from such violence, all are guilty of murder, even though the felony be one that does not in itself involve violence, such as larceny.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on May 26, 1954, of murder and were sentenced by Glyn-Jones J. to death.

The appellants had embarked on a plan to steal from a hotel at which the appellant Gilbert had been previously employed and to overcome by force any resistance on the part of the night porter whom they knew to be employed there. In the course of resistance offered by the night porter, he was struck several blows, knocked senseless on the floor and gagged, and later died from the injuries he had sustained.

Glyn-Jones J. declined to leave the issue of manslaughter to the jury and directed them that, if they were satisfied that, as a result of a common design on the part of the appellants, violence was used to the porter, and the porter died as a result of that violence, it was the duty of the jury to convict both appellants of murder.

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John Hazan, for the appellant Grant:

The question raised by the appeal is the liability of a thief who unintentionally and inadvertently causes the death of someone protecting his master's property in the course of a struggle. The judge in this case wrongly withdrew the issue of manslaughter from the jury and wrongly directed them on the meaning of "felony involving violence" when laying down the principle that, if death is caused in the commission of a felony involving violence, that amounts to murder. The proper meaning of the term is a felony intrinsically involving violence such as rape or robbery with violence and not a felony merely accompanied or preceded by violence. [He referred to DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD, 14 Cr.App.R. 159; [1920] A.C. 479, and BETTS AND RIDLEY (1930) 22 Cr.App.R. 148.] Here the felony in contemplation was that of a larceny in a dwelling-house, which was not one intrinsically involving violence.

F. Petre Crowder, for the appellant Gilbert:

The argument for the appellant Grant is adopted on behalf of this appellant. All the cases where the doctrine of death arising out of a felony involving violence amounting to murder has been considered have been concerned with felonies such as rape which intrinsically involve violence.

Christmas Humphreys and *Mervyn Griffith-Jones* for the Crown were not called on to argue.

THE LORD CHIEF JUSTICE: The appellants were convicted before Glyn-Jones J. of the murder of George Smart, a porter at the Aban Court Hotel, where one of the appellants had been previously employed and from which they had set out to steal what they could find. The enterprise was preconceived on their own story; both made full statements on the subject and gave evidence. The appellant Gilbert, who had previously been employed at the hotel, knew of a way through a coke store by which it would be possible to enter the hotel without actually breaking in. It was assumed thoughout the case that there was no burglary in the technical sense because there

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was not a breaking. The appellant Gilbert, who knew how to get in, knew also that there was a night porter employed on the premises. The night porter was, no doubt, employed to let guests into the hotel after the ordinary hours, but was also a night watchman whose duty was to protect the hotel and give the alarm if untoward things happened.

The appellants plotted what they would do with regard to that porter. The scheme was, apparently, that Grant should go through some actions, turn out the light and call out "George," so that the porter would come out, whereupon Gilbert would jump on him, and both would tie him up and push him into a telephone box. Assuming everything in favour of the appellants, that was their scheme and they did not intend to gag the porter, but what they did intend to do was to overcome any resistance that might be offered by him. They, therefore, started out on this enterprise with a preconceived idea, not merely of committing the felony of larceny, but also of using as much force as they found necessary to overcome resistance by the night porter. In fact, they used shocking violence to him. He was struck several blows, knocked senseless on the floor, and when lying unconscious there was gagged by having a crepe bandage tied round his mouth after some textile material had been inserted. The bandage had been taken there for the purpose of gagging him. Then his ankles and hands were tied. It seems that, on partially recovering consciousness, he must have moved himself, because, according to the appellants, the place where they left him was a different place from the place where his body was found. In partially getting up—though this is a matter of conjecture—he may have fallen and struck his nose or face in some way so that the blood which was thereby caused suffocated him because the gag prevented him from expelling the blood through his mouth.

It is contended that there was not in this case a felony involving violence and that, therefore, the appellants are not guilty of murder, and it is contended that the learned judge

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ought to have directed the jury that it was open to them to find manslaughter. The way in which the learned judge put the case to the jury in his final direction was this: "If you are satisfied that violence was used from which George Smart died, upon all of which matters the evidence is only one way, why, then, it is your bounden duty to come back and return a verdict of murder against them." In the opinion of the court that was a perfectly right direction, because the appellants on their own admission had had the preconceived intention, when they started out, to offer violence to Smart. The degree of violence does not matter if it was a degree of violence which caused death; that has always been the law. In BETTS AND RIDLEY (1930) 22 Cr.App.R. 148, Avory J. in giving the judgment of this court, said, at p. 154: "As was said in East's *Pleas of the Crown*, at p. 256 . . . 'He who voluntarily, knowingly and unlawfully intends hurt to the person of another, though he intend not death, yet if death ensue, is guilty of murder or manslaughter according to the circumstances. As if A, intending to beat B, happen to kill him, if done from preconceived malice'—if done from preconceived intention to rob with violence, it would be the same thing as if done with malice— 'it will be no alleviation that he did not intend all the mischief that followed.'" As in the course of the argument my brother Lynskey put it, if the act is the result of a preconceived intention, that supplies the malice which is necessary in law and the killing becomes a killing with malice aforethought. Here there was a preconceived intention to overcome Smart and therefore to use violence towards him. The felony, therefore, on which the appellants embarked was a felony to steal from a dwelling-house and, knowing there would be a watchman there, to offer violence towards him. In those circumstances, as that violence resulted in the death of the unhappy man, the appellants were guilty of murder.

The direction of Glyn-Jones J. was, therefore, perfectly right and these appeals are dismissed.

Appeals dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SLADE

GEORGE BAINBRIDGE BOYLE

1954
July 19

Housebreaking — Constructive Breaking — Entrance to House Obtained by Trick—Larceny Act, 1916 (6 & 7 *Geo.* 5 *c.* 50), *s.* 26 (1).

Trial—Arraignment—Indictment Containing Number of Counts—Each Count to be put Separately and Pleas Taken Separately —Counts Charging Alternative Offences.

The appellant, who had no connection with the B.B.C., called at a house and told the householder that he had come on behalf of the B.B.C. to try to locate disturbances caused on the radio. The householder, believing this, admitted him into the house and while in the house the appellant stole her handbag.

Held, that as the appellant had obtained entry into the house by means of a trick, there had been a constructive breaking, and he was properly convicted of housebreaking.

Where an indictment contains several counts, each count should be put to the prisoner separately, and he should be asked to plead to each count as it is read to him.

Where the counts are for alternative offences, *e.g.*, for larceny and receiving, the first count should be put to the prisoner separately. If he pleads Guilty to that, there is no need to put the second and alternative count; but if he pleads Not Guilty to the first, the second and alternative count should be put separately and his plea taken on it.

Appeal against conviction.

The appellant was arraigned at the Central Criminal Court on May 4, 1954, on an indictment containing four counts, the first of which charged housebreaking and larceny, the second forgery of a valuable security, the third uttering the valuable security, and the fourth obtaining property by means of a forged document, knowing it to be forged. The indictment

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was put to him as a whole, and he entered a general plea of Guilty. He was sentenced by the Common Serjeant to four years' imprisonment.

The facts with regard to the first count were that the appellant, who had no connection with the B.B.C., called at a house and told the householder that he was calling from the B.B.C. to try to locate disturbances on the radio. The householder, believing this, admitted him and showed him her radio set. The appellant then asked for a glass of water, and when the householder went to fetch it, stole her handbag.

E. Garth Moore for the appellant.
Victor Durand for the Crown.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty at the Central Criminal Court to an indictment containing four counts, the first of which was for housebreaking with intent to steal and larceny. The indictment was put as a whole to him and he pleaded to it as a whole. I will say a word about that in a few moments.

The facts with regard to the breaking were that he rang the bell and, when the householder answered, told her that he was calling from the B.B.C. to try and locate disturbances caused on the radio, and on that belief she admitted him to the house. He was not sent by the B.B.C. at all; it was a trick to get into the house. Then, when she showed him her radio set, he asked for a glass of water, and while she was getting it, he stole her handbag.

The question is whether that amounts to housebreaking. In the opinion of the court, it does. There was a constructive breaking, and the law cannot be better stated than it is stated in the present 33rd. edition of Archbold's *Criminal Pleading etc.*, at p. 669: "A constructive breaking is where the offender, with intent to commit a felony, obtains admission by some artifice, trick, or threat, for the purpose of effecting it." In other words, if the householder, had she known the true facts, would not have admitted the prisoner, and the prisoner has

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obtained admission by means of a trick or a threat, that is in law a constructive breaking. Take the very common case where a man represents himself as calling from a gas company or an electric light company. If he is a man from the company who comes into the house for the proper purpose and steals when he is in the house, that is not breaking and entering; that is larceny in a dwelling-house, because he has not used a trick to get into the house. He has come in the ordinary course of his duty, representing (as he is in fact) that he is an employee of the company whose duty it is to read the meter. If he has come in to read the meter and then steals in the house, the offence is larceny in the dwelling-house and not breaking and entering. In this case the court has no doubt that the appellant did obtain entry by means of a trick, and that therefore there was a constructive breaking, and, as it must be taken that he went there with a felonious intent and for the purpose of committing a theft, he was properly convicted of housebreaking.

The real reason why the court gave leave to appeal was that it might have an opportunity of expressing its view with respect to a practice which has obtained for many years at the Central Criminal Court. The practice may also have obtained at certain sessions, though I do not think it obtains as a rule on the circuits. Where an indictment contains several counts, it has been the habit of some courts, and certainly the Central Criminal Court, to put the whole indictment to the prisoner at once and ask him to plead after the whole indictment has been read. In this case, for instance, there were four counts. The first count charged housebreaking, the second count charged forging a valuable security with intent to defraud, the third count charged uttering a valuable security and the fourth count charged obtaining a motor-car by virtue of a forged cheque. All those four counts were read to the appellant together, he was then asked to plead to the whole indictment and pleaded Guilty.

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The court desires to say that in its opinion the right practice, where there is more than one count in an indictment, is that each count should be put to the prisoner separately and he should be asked to plead to each particular count. It should be remembered that every count in an indictment is equivalent to a separate indictment; the prisoner can be tried on one or all the counts. The verdicts have to be taken separately, and the right practice is that he should be asked to plead to each count as each count is read to him and then there can be no doubt on how he intends to plead. At the Central Criminal Court it has generally been the practice, if the prisoner is not represented, to put the whole indictment at once, and, if he is represented, to put the counts separately so that counsel can tell him to what counts to plead Guilty and to what counts Not Guilty. But in the opinion of this court it is the right practice, and the one which ought to prevail in the future in all courts, that each count should be put separately to the prisoner and he should be asked to plead to each count separately.

What I have said is to be taken as applying not only to counts which are of a different nature, but even where there are alternative counts. For instance, where there are counts for stealing and receiving, it is proper that the two counts should be put separately. The count for stealing should be put first to the prisoner. If he pleads Guilty to that, there is no need to put the count for receiving, but if he pleads Not Guilty, then the count for receiving should be put as a separate count and a plea taken upon it. There is no other point that arises in this case, and therefore the appeal is dismissed.

Appeal dismissed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

[COURTS-MARTIAL APPPEAL COURT]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SLADE

GEORGE HADFIELD

1954
July 19, 20

Court-Martial—Person Subject to Military Law—Termination of Colour Service—Soldier Entitled to be Transferred to Reserve —Transfer not Effected at time of offence—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 90 (1), (3) *as amended*, (4).

By the Army Act, 1881, s. 90 (as amended), it is provided: (1) "Save as otherwise provided by this Act or the Acts relating to the Reserve Forces, every soldier of the Regular Forces, upon becoming entitled to be discharged, shall be discharged with all convenient speed, but until so discharged shall be subject to this Act as a soldier of the Regular Forces. . . ." (3) (as amended): "Every soldier of the Regular Forces, upon falling to be transferred to the Reserve, but until so transferred shall be subject to the Act as a soldier of the Regular Forces." (4) "Where a soldier of the Regular Forces, when entitled to be transferred to the Reserve, is serving out of the United Kingdom, he shall be sent to the United Kingdom free of expense with all convenient speed, and on his arrival shall be transferred to the Reserve."

The appellant enlisted on June 10, 1948, for five years with the Colours and seven years on the Reserve. He was arrested for offences against military law while still in Egypt, on June 17, 1953, and was subsequently convicted by court-martial. He had not been transferred to the Reserve at the time when he was arrested or at the time when he appeared before the court-martial.

Held, that, by virtue of the above provisions, the appellant remained subject to military law until he was transferred to the Reserve, and that the court-martial had, accordingly, jurisdiction to try him.

Appeal against conviction.

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The appellant, who was a sergeant in the R.A.S.C., was convicted by a court-martial sitting in the Canal Zone of conspiracy to steal and of stealing Government property, and was sentenced to ten years' imprisonment.

The appellant enlisted on June 10, 1948, for five years with the Colours and seven years on the Reserve. His Colour service was due to terminate on June 10, 1953. He was arrested while still in Egypt, for the offences of which he was subsequently convicted, on June 17, 1953. Neither at the time of his arrest nor at the time when he appeared before the court-martial had he been transferred to the Reserve.

Norman J. Skelhorn, Q.C., and *N. J. L. Brodrick* for the appellant contended that the appellant was not subject to military law.

E. Garth Moore for the Crown.

THE LORD CHIEF JUSTICE: The appellant, who was a sergeant in the R.A.S.C. was convicted of various serious offences, before a court-martial sitting in the Canal Zone, and was sentenced to ten years' imprisonment. The first point that has been taken by Mr. Skelhorn, with which we will deal at once, is that the appellant was not subject to military law. He was enlisted on June 10, 1948, for five years with the Colours and seven years on the Reserve. His Colour service terminated, so it is said, on June 10, 1953. He was arrested for these particular offences while still in Egypt, still apparently drawing pay as a sergeant, on June 17, not having at that time been sent back to the United Kingdom.

By section 90 of the Army Act (as amended), it is provided: "Save as otherwise provided by this Act or the Acts relating to the reserve forces, every soldier of the regular forces, upon becoming entitled to be discharged, shall be discharged with all convenient speed, but until so discharged shall be subject to this Act as a soldier of the regular forces." By subsection (3) as amended it is provided: "Every soldier of the regular forces, upon falling to be transferred to the Reserve, shall be

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transferred to the Reserve, but until so transferred shall be subject to this Act as a soldier of the regular forces."

We are asked to say that the appellant ought to have been transferred to the Reserve, and, as he had not been transferred to the Reserve but was still in Egypt and was still serving with his unit, he cannot be subject to military law. That seems to me to give the go-by to the words of subsection (3) " until so transferred shall be subject to this Act as a soldier of the regular forces."

It is further provided by subsection (4): " Where a soldier of the regular forces, when entitled to be transferred to the Reserve, is serving out of the United Kingdom, he shall be sent to the United Kingdom free of expense with all convenient speed, and on his arrival shall be transferred to the Reserve." It is impossible, it seems to me, to read these subsections as saying that the moment when a soldier is entitled to be transferred to the Reserve he ceases to be subject to military law. That would seem to be exactly contrary to the words of subsection (3). He ceases to be subject to military law when he is transferred, but not until then. The appellant had not been transferred to the Reserve at the time when he was arrested or at the time when he was brought before the court-martial. It is quite unnecessary to consider the provisions of section 158 or section 87, to which we have been referred. In my opinion, the court-martial had jurisdiction, and on that point this appeal fails.

[The court then heard the appeal on the ground of alleged misdirection and dismissed it.]

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE SLADE

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CONSTANTINE NICOLOUDIS

Evidence—Character of Prisoner—Charge of Obtaining Money by Forged Instrument—Cross-Examination on Previous Charge of Forgery where Charge Withdrawn—No Issue of Knowledge of Prisoner that Instrument was Forged—Conviction Quashed.

The appellant was convicted of obtaining money by means of a forged cheque. The cheque bore the signature of D. W. G., a friend of the appellant, but D. W. G. denied having signed it. The appellant's defences were (i) that D. W. G. had signed the cheque; (ii) that he (the appellant) was not the person who had presented the cheque at the bank or obtained the money. He did not put forward the defence that, if the cheque was forged, he had no knowledge of the forgery. In his evidence the appellant stated that he had never been convicted of any offence, and was cross-examined by prosecuting counsel on having been charged with forging a cheque on a previous occasion where the charge had subsequently been withdrawn.

Held, that such cross-examination might well have been admissible if the issue in the case had been whether the appellant knew the cheque named in the indictment to be forged; but no such issue having been raised, cross-examination on a previous charge which had not resulted in conviction was inadmissible, and the conviction must be quashed.

MILLARD (1813) R. & R. 245, commented on and explained.

MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr. App.R. 152; [1935] A.C. 309, followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on May 14, 1954, of obtaining £120 by means of a forged cheque and was sentenced by the Recorder of London to ten months' imprisonment.

The cheque in question bore the signature of Desmond Walter Guinness, who was a friend and fellow-undergraduate

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of the appellant. Guinness gave evidence that he had never signed the cheque, and a bank cashier identified the appellant as the person who had presented the cheque at the bank and obtained the money. The appellant's defences were (i) that Guinness had signed the cheque; (ii) that he (the appellant) was not the person who had presented it at the bank. He did not raise the defence that, if the cheque was forged, he had no knowledge of the forgery. The appellant, in his evidence-in-chief, stated that he had never previously been convicted of any offence, and, by leave of the judge, was cross-examined by prosecuting counsel about another cheque which he had been charged with forging on a previous occasion, though the charge had subsequently been withdrawn.

S. H. Noakes, for the appellant:

Cross-examination on a previous charge which was subsequently abandoned was inadmissible: MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 24 Cr.App.R. 152; [1935] A.C. 309; WADEY (1935) 25 Cr.App.R. 104. The Recorder appears to have admitted the cross-examination on the ground that the appellant had put his character in issue, but the authorities cited clearly show that it could not properly have been admitted on that ground, and as it was not relevant to any issue in the case it could not have been rendered admissible on any other ground.

Victor Durand, for the Crown:

The cross-examination was not sought to be introduced on the ground that the appellant had put his character in issue, and it could not properly have been introduced on that ground. It was introduced on quite a different ground, namely, with a view to proving that the appellant knew that the cheque named in the indictment was forged. [He referred to Archbold's *Criminal Pleading etc.*, 33rd ed., p. 822, and MILLARD (1813) R. & R. 245.]

THE LORD CHIEF JUSTICE: The appellant was convicted before the learned Recorder of London of obtaining money by

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means of a false instrument. He was an undergraduate of Oxford, and a friend and fellow-undergraduate of Mr. Desmond Guinness, whose signature was forged and who comes from a wealthy family.

The case against the appellant, and it was a very formidable case, was that he got into Mr. Guinness' room and somehow or other possessed himself of his cheque book. He was found in Mr. Guinness' room in suspicious circumstances, and one of Mr. Guinness' cheque forms for £120 was forged. Mr. Guinness had lent the appellant, who is a Greek subject, money on a previous occasion and had been very kind to him. The case for the prosecution was that the appellant went into the bank with this cheque and obtained money upon it. His defence was that he never handled the cheque at all, and the evidence for the prosecution, beyond the fact that Mr. Guinness swore that he had not signed the cheque, was the evidence of a bank cashier, who was absolutely positive with regard to the appellant's identity. He gave very good reason why he should be positive, because the cheque was not signed quite in the way in which Mr. Guinness usually signed his cheques, and therefore the bank cashier took the cheque away from the appellant to compare the signature with the signature of Mr. Guinness. He remembered that the appellant stood there while he was doing it. Having compared the writing with the specimen signature of Mr. Guinness which he had, he came to the conclusion that the signature was that of Mr. Guinness—it was an uncommonly good forgery—and he paid the money.

The first defence which the appellant set up through his counsel was that it was actually suggested to Mr. Guinness that he had signed this cheque himself, about as dirty a suggestion as could be made because it amounted to a suggestion that Mr. Guinness was supporting this prosecution by the bank and allowing his friend to be charged with forgery. Of course, if Mr. Guinness had been guilty of such conduct as that—and the jury by their verdict showed that they did not believe for a moment that he had been—his conduct would be such

that he would be almost unfit for decent society. We could not however say that, because that was alleged, evidence of the appellant's previous character could be put in issue. When a man is charged with obtaining money on a forged instrument, the prosecution have to prove that the instrument was forged and it is open to the defence to say that it was not forged without putting the prisoner's character in issue. The appellant did put his character in issue to this extent, that he said he had never been convicted of any previous offence. The learned Recorder allowed counsel for the prosecution to put questions to the appellant when he was in the box about having been mixed up with a forged cheque on a previous occasion, as he had been. But in MAXWELL *v.* DIRECTOR OF PUBLIC PROSECUTIONS, the House of Lords (24 Cr.App.R. 152; [1935] A.C. 309) laid it down once and for all that, except in certain circumstances where it may be relevant, such as on questions of system, a prisoner who has put his character in issue cannot be asked whether he has been previously charged with an offence of which he has been acquitted or where the case has not been carried to conviction. On the particular matters on which this appellant was cross-examined he said he had been charged with forging a cheque, the forgery being, as I understand, forgery of his guardian's signature, who was also some relation, but the charge had not been proceeded with, the guardian having apparently induced the police to drop the case.

Mr. Durand has not sought to justify the questions on the ground that the appellant had put his character in issue, because he recognises that the case of MAXWELL (*supra*) in the House of Lords would render the cross-examination inadmissible on that ground, but he says he put the questions with a view to showing the appellant's knowledge that the cheque named in the indictment was a forgery. It is quite obvious that, when a discussion took place with regard to this matter in the absence of the jury, the learned Recorder evidently thought that the questions were to be put, and seems to have

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agreed to admit them, on the ground that the appellant had put his character in issue, because there was also a discussion about a gold cigarette case which the appellant had obtained from Fortnum & Mason's and pawned before he had paid for it. Mr. Durand sought to justify the putting of these questions on the ground that they went to show that the appellant knew that the cheque was forged. I pause to say that the appellant's defence was not that he did not know that the cheque was forged, if it was forged. His defence was, first of all, to suggest that Mr. Guinness was supporting a false charge against him because Mr. Guinness had signed the cheque himself; the second and main defence was that he was not the man who went into the bank. Of course, if both those defences failed, and we must assume from the verdict of the jury that they did fail, the jury would have no difficulty in finding that he knew that the cheque was forged.

Mr. Durand, who says that he only knew of this question of the previous cheques at the last minute, has apparently looked at Archbold's *Criminal Pleading etc.*, 33rd ed., at p. 822, where it is stated: "Upon an indictment for disposing of and putting away a forged bank note, knowing it to be forged, proof that the prisoner had passed other forged notes, if proved by legitimate evidence, raises a probable presumption that he knew the note, for the passing of which he is indicted, to be forged." The first case that is cited for that proposition is MILLARD (1813) R. & R. 245. Having looked at that case, I cannot say that I think it supports the proposition, at any rate in such wide terms. No doubt, if the issue in the case were whether or not the prisoner knew that the cheque was forged, it might very well be that in certain circumstances it could be proved that he forged or dealt with other forged cheques because that would tend to show that he knew that the cheque which was named in the indictment was forged. But the issue being in the case (*a*) whether the cheque was forged, and (*b*) whether or not the appellant was the man who took the cheque to the bank, it does not seem to me relevant

to that issue to show that on a previous occasion about a year previously he had been arrested and charged, but not prosecuted to conviction, with the offence of forging somebody else's name.

Accordingly, in our opinion, these questions were not questions which were permitted by the Criminal Evidence Act, 1898. Then comes the question: What is to be done? With considerable reluctance the court has come to the conclusion that it must quash the conviction because these were questions that were highly prejudicial to the appellant, and we cannot say with certainty that the jury without these questions would have convicted. But the appellant's conduct in this matter has certainly been of the most deplorable character.

Conviction quashed.

[The court ordered that another indictment for obtaining property by false pretences, which had been left on the file of the Central Criminal Court, should be tried at the next Sessions. It was tried and the appellant was acquitted.]

Solicitors: Summer & Co., for the appellant; The Solicitor, Metropolitan Police, for the Crown.

[CENTRAL CRIMINAL COURT]

BEFORE

MR. JUSTICE STABLE

1954
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R. *v.* MARTIN SECKER WARBURG LTD. & OTHERS

Obscene Libel—Test of Obscenity—Novel Describing Contemporary Life—Changed Approach to Sex to be Considered—Book not Necessarily Obscene because in Bad Taste or Undesirable.

On a charge of obscene libel, although the test laid down in HICKLIN (1868) L.R. 3 Q.B. 360 at p. 371, "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" remains unaltered, in deciding whether a recently published novel, admittedly concerned with sex relationship and purporting to describe contemporary life, is obscene or not, a jury may take into account the alteration in the approach to the question of sex that has taken place since 1868. A book is not obscene merely because it is in bad taste or undesirable.

Trial on indictment at the Central Criminal Court before Stable J.

The defendants, Martin Secker Warburg Ltd., publishers, Frederick John Warburg, a director of the company, and the Camelot Press Ltd., printers, were charged with publishing an obscene libel, namely, a novel called "*The Philanderers*" by Stanley Kauffman. All pleaded Not Guilty. After evidence had been given, Stable J. directed that each member of the jury be given a copy of the book to read in private.

J. H. M. Griffith-Jones, for the Crown.

Rodger Winn, for the defendant, Frederick John Warburg.

Maxwell J. H. Turner, for the two defendant companies.

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STABLE J. directed the jury as follows: The charge against two limited liability companies and the individual is a charge of publishing what is called an obscene libel. Everybody agrees that the two companies and the individual director stand or fall together. There can be no dispute that the verdict which you will give is a matter of the utmost consequence. It is a matter of very real importance to the defendants and to the individuals who are associated with them. It is of importance too, to authors who, from their minds and imagination, create imaginary worlds for our edification, amusement, and sometimes, too, for our escape. It is a matter of importance to the community in general—to the adolescent, perhaps, in particular. In addition to that, it is of great importance in relation to the future of the novel in the civilised world and the future generations who can derive their knowledge of how persons lived, thought and acted only from the contemporary literature of the particular age in which they are interested. Your verdict will have a great bearing on where the line is drawn between liberty, freedom to read and think as the spirit moves, on the one hand, and licence, which is an affront to the society of which we are all members, on the other.

The important duty of deciding rests fairly and squarely on your shoulders. It is not what I think about this book that matters; it is the conclusion which you reach. You represent that diversity of minds and ages which represents the reading public of the English-speaking world. You and you alone must decide the case and if, in the course of this summing-up, I express my opinion about the matter, you are entitled to ignore it. During the closing speech for the prosecution it seemed to me that there was, if I may say so without offence, a certain confusion of thought. It was suggested that, by what you decide today, you are to determine whether books like this will or will not be published in the future. May I venture to say that your task is nothing of the kind? We are not sitting here as judges of taste. We are not here

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to say whether we like a book of this kind. We are not here to say whether we think it would be a good thing if books like this were never written. You are here trying a criminal charge. In the criminal court you cannot find a verdict of Guilty against the defendant unless, on the evidence that you have heard, you are fully satisfied that the charge has been proved. The burden of proof in this criminal case, as in all criminal cases, rests on the prosecution from start to finish.

The test of obscenity today is extracted from a decision of 1868, HICKLIN (1868) L.R. 3 Q.B. 360, at p. 371; and it is this: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." Because that is a test laid down in 1868, it does not mean that what you have to consider is, supposing this book had been published in 1868 and the publishers had been prosecuted in 1868, whether the court or the jury, nearly a century ago, would have reached the conclusion that the book was an obscene book. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall this year, or last year when it was published in this country, or next year, or the year after next. Considering the curious change of approach from one age to another, it is not uninteresting to observe that in the course of the argument of the case in 1868 the rhetorical question was asked (at p. 365). "What can be more obscene than many pictures publicly exhibited, as the Venus in the Dulwich Gallery?" There are some who think with reverence that man is fashioned in the image of God, and you know that babies of either sex are not born into this world dressed in a frock-coat or an equivalent feminine garment.

This book, as I venture to think you will have already appreciated, is obviously and admittedly absorbed with sex, the relationship between the male and the female of the human

species. I, at all events, approach that great mystery with profound interest and at the same time a very deep sense of reverence. We cannot get away from it. It is not our fault that but for the love of men and women and the act of sex the human race would have ceased to exist thousands of years ago. It is not our fault that the moment in, shall we say, an over-civilised world—if " civilised " is an appropriate word —sex ceases to be one of the great motive forces in human life, the human race will cease to exist. It is the essential condition of the survival and development of the human race, for whatever ultimate purpose we have been brought into this world. Speaking to a representative group of people, nine men and three ladies, I suppose each one of you is of good will and anxious that in our approach to this great mystery today we should achieve some solution which will lead to personal happiness between the sexes in millions of homes throughout this island. This, after all, is the only possible foundation on which to build a vigorous, strong and useful nation.

It is interesting, throwing one's mind back over the ages, that the only real guidance we get about how people thought and behaved is their contemporary literature. Where should we be today if the literature of Greece, Rome and other past civilisations portrayed, not how people really thought and behaved, but how they did not think and how they did not speak and how they did not behave? Rome and Greece, it is not uninteresting to reflect, elevated human love to a cult, if not a religion, represented by Venus in the Roman world and Aphrodite in the Greek, two goddesses in the form of women. Then Greece and Rome, like other civilisations, were swept away. When we reach the Middle Ages, we find an entirely different approach. The priesthood was compelled to be celibate and a particular qualitative holiness was attached to the monks and nuns who dedicated themselves to a cloistered and sheltered life. You may think it is lucky that all the people were not quite as holy as that because, if they had been, none of us would have been here today.

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Approaching this matter which—let us face it—throughout the ages has been one of absorbing interest to men and women, you get two schools of thought poles apart and between these two extremes you have a variety of opinion and thought. At one extreme you get the conception illustrated, I venture to think, in some of the teachings of the medieval church, that sex is sin, that the whole thing is dirty, and that it was a mistake from beginning to end (and, if it was, it was the great Creator of life who made the mistake and not you or I) and the less said about this wholly distasteful topic the better; let it be covered up and let us pretend it does not exist. At the other extreme you get the line of thought which says that nothing but mischief results from this policy of secrecy and covering up, that the whole thing is just as much a part of God's universe as anything else, and the proper approach to the matter is one of frankness, plain speaking, and the avoidence of any sort of pretence. I suppose that the extreme expression of that view is to be found in the nudist colonies where people, I understand, walk about, weather permitting, without any clothes at all. Somewhere between those two poles the average, decent, well-meaning man or woman takes his or her stand.

Turning for a moment to the book you have to consider, it is, as you know, in the form of a novel. Remember the charge is a charge that the tendency of the book is to corrupt and to deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: "Well, corrupt and deprave whom?" to which the answer is, those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles, is

wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the public. I venture to suggest that you give a thought to what is the function of the novel. I am not talking about historical novels when people write a story of some past age. I am talking about the contemporary novelist—the novelist who writes about his contemporaries, who holds up a mirror to the society of his own day. The function of the novel is not merely to entertain contemporaries; it stands as a record or a picture of the society when it was written. Those of us who enjoy the great Victorian novelists get such understanding as we have of that great age from chroniclers such as Thackeray, Dickens, Trollope, Surtees and many others of that age.

In the world in which we live today it is equally important that we should have an understanding of how life is lived and how the human mind is working in those parts of the world which are separated from us not in point of time, but in point of space, and that we should have this understanding, particularly at a time like today when ideas and creeds and processes of thought seem, to some extent, to be in the melting-pot and people are bewildered and puzzled to know in what direction humanity is heading and in what column we propose to march. If we are to understand how life is lived in the United States of America, France, Germany, or elsewhere, the contemporary novels of these nations may afford us some guide, and to those of us who have not the time, opportunity, money or, possibly, the inclination to travel, it may even be the only guide. This is an American novel written by a citizen of the United States of America, published originally in New York, purporting to depict the lives of people living today in New York, and to portray the speech, the turn of phrase, and the current attitude towards this particular aspect of life in New York. If we are going to read novels about how things go in New York, it would not be of much assistance, would it, if, contrary to the fact, we were led to suppose that in New York no unmarried woman or teenager has disabused her mind

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of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes?

This is a very crude work, you may think. You will consider whether or not it does seek to present a fair picture of aspects of contemporary American thought in relation to this problem. You will, no doubt, further consider whether or not it is desirable that on this side of the Atlantic we should close our eyes to a fact because we do not find it altogether palatable. You have heard a good deal about the putting of ideas into young heads. But is it really books that put ideas into young heads, or is it nature? When a boy or a girl reaches that stage in life's journey when he or she is passing from the state of blissful ignorance through that perilous stage which we call " adolescence " and finds himself or herself traversing an unknown country without a map, without a compass, and sometimes I am afraid, in the case of a bad home, without a guide, it is the natural change from childhood to maturity that puts ideas into young heads. It is the business of parents and teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfilment of a balanced individual life.

I am going to say a few words about the book itself, again reminding you that the determination of this case is a matter exclusively for you. If you do not agree with any view that I may indicate or express, well, you do not agree with it. Your disagreement is paramount. You may think that it is a good book, or a bad book, or a moderate book. It is at least a book. It is the creation of a human mind and it depicts people created by the author in the environment in which that portion or portions of their lives with which the book deals were spent. You may agree or you may not—I do not know—that it is not mere pornographic literature, the filthy, bawdy muck that is just filth for filth's sake. Probably you, ladies, have never seen such a work except, perhaps, by accident. Some of the men, in their younger days, may furtively have glanced at the literary output of Port Said and felt rather ashamed of themselves afterwards. This book purports to be

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a picture of contemporary life in New York, and the subject-matter of the work is largely the relationship of the two sexes. If you look at the front page, you will see the text. It is taken from a Victorian poet, Browning:

> "What of soul was left, I wonder,
> When the kissing had to stop?"

I suppose men and women of all ages have wondered that.

The theme of the book is the story of a rather attractive young man who is absolutely obsessed with his desire for women. It is not presented as an admirable thing, or a thing to be copied. It is not presented as a thing that brought him happiness or any sort of permanent satisfaction. Throughout the book you hear the note of impending disaster. He is like the drunkard who cannot keep away from drink, although he knows where it will lead him in the end. So far as his amatory adventures are concerned, the book does deal with candour, or, if you prefer it, crudity, with the realities of human love and of human intercourse. There is no getting away from that, and the Crown say: "This is sheer filth." Is it? Is the act of sexual passion sheer filth? It may be an error of taste to write about it. It may be a matter in which perhaps, old-fashioned people would mourn the reticence that was observed in these matters yesterday, but is it sheer filth? That is a matter which you have to consider and ultimately to decide. There is another aspect of the book, which certainly is not pretty or particularly attractive, but that is not what you have to consider. I have told you the test and I will not repeat it. That part of the story deals with this young man's adolescence, and begins: "But Russell never told Robert that his own first memory, dating from about the age of three, was of being waked in the middle of the night by two shouting voices, of hearing a plate crash and his father's voice raised almost to a high-pitched scream," and so on. The author is tracing the moral decline of this man back to his childhood where the unhappy relations between his mother and his father left a sort of permanent bruise on his personality. It goes on

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to describe the pitfalls of slime and filth with which the unhappy adolescent, without knowledge or experience, without the map and the compass and without the guiding hand of a wise parent or the example of a well-ordered, decent home, stumbles. You will have to consider whether in this the author was pursuing an honest purpose and an honest thread of thought or whether that was all just a bit of camouflage to render the crudity, the sex, of the book sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions.

The literature of the world from the earliest times when people first learned to write—literature sacred and profane, poetry and prose—represents the sum total of human thought throughout the ages and from all the various civilisations which the human pilgrimage has traversed. Are we going to say in England that our contemporary literature is to be measured by what is suitable for the fourteen-year-old schoolgirl to read? You must consider that aspect of the matter and there is another aspect of the matter which I should like you to consider before you come to your conclusion. I do not suppose there is a decent man or woman in this court who does not wholeheartedly believe that pornographic, filthy books ought to be stamped out and suppressed. They are not literature. They have got no message, no inspiration, no thought. They have got nothing. They are just filth, and, of course, they ought to be stamped out; but in our desire for a healthy society, if we drive the criminal law too far, farther than it ought to go, is there not a risk that there will be a revolt, a demand for a change in the law, so that the pendulum will swing too far the other way and allow to creep in things that under the law as it exists today we can exclude and keep out? Remember what I said when I began. You are dealing with a criminal charge. This is not a question of what you think is a desirable book to read. It is a criminal charge of publishing a work with a tendency to corrupt and deprave those into whose hands it may fall. Before you can return a verdict of Guilty on

that charge, you have to be satisfied that that charge has been proved. If it is anything short of that, the accused companies and individual are entitled to a verdict at your hands of Not Guilty.

Verdict—Not Guilty.

Solicitors : Oswald Hickson, Collier & Co., for the defendants.

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[IN THE HOUSE OF LORDS]

LORD SIMONDS (LORD CHANCELLOR), LORD PORTER, LORD GODDARD (LORD CHIEF JUSTICE), LORD TUCKER AND LORD ASQUITH OF BISHOPSTONE

BEDDER *v.* DIRECTOR OF PUBLIC PROSECUTIONS

1954
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Murder—Provocation—Test of Effect of Provocation on Mind of Reasonable Man—Reasonable Man not to be Invested with Physical Peculiarities of Prisoner.

The appellant who, as he knew, was sexually impotent, attempted in vain to have intercourse with a prostitute. She jeered at him and attempted to get away, and when he struggled, she punched and kicked him. The appellant then stabbed her with a knife and killed her.

Held that, in determining whether there had been provocation sufficient to reduce the crime from murder to manslaughter, the test to be applied was the effect of the alleged provocation on the mind of an ordinary reasonable man, and in applying this test, it was not right notionally to invest the hypothetical ordinary reasonable man with the physical peculiarities of the person charged.

MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr.App. R. 65; [1942] A.C. 1 applied.

Appeal by the prisoner from order of the Court of Criminal Appeal dismissing appeal against conviction.

The appellant was convicted at Leicester City Assizes on May 27, 1954, of the murder of Doreen Mary Redding, a prostitute, and was sentenced by Sellers J. to death.

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The appellant, a youth of eighteen, was sexually impotent, a fact which he knew and allowed to prey on his mind. He attempted in vain to have intercourse with Doreen Mary Redding in a quiet court off a street in Leicester. Thereupon, according to the appellant's evidence, she jeered at him and attempted to get away, and when he still tried to hold her, slapped him in the face and punched him in the stomach and, in the course of the struggle, kicked him in the privates with her knee or foot. He thereupon drew a knife from his pocket and stabbed her twice, the second blow inflicting a mortal injury. The material portions of the summing-up of Sellers J. are set out in the speech of the Lord Chancellor.

On June 21, 1954, an appeal against conviction was dismissed by the Court of Criminal Appeal (Hilbery, Cassels and Havers JJ.). On July 23, 1954, an appeal by the appellant against the order of the Court of Criminal Appeal was heard by the House of Lords.

The Attorney-General gave his certificate for the appeal on the following point of law :—

Where provocation is set up as the defence to a charge of murder, to what extent (if at all) it is relevant, in considering the effect on a reasonable man of the alleged provocation, that the accused suffers from a physical infirmity or disability likely to render a person similarly affected more susceptible to the provocation alleged than a person not so affected; and in the present case whether or not the judge ought to have directed the jury as a matter of law that they should consider whether in the circumstances a reasonable man who was sexually impotent would have been provoked to act as the accused acted and not merely (as he did in fact direct them) whether in the circumstances a reasonable man would have been so provoked.

A. P. Marshall, Q.C., for the appellant :

It is difficult to get a complete grasp of the principles on which the doctrine of provocation has been developed without

looking into the history of the development. The view gradually obtained that if the killing sprang "not from hatred, rage or diabolical malignity," but from human infirmity or frailty, it was shocking that the same penalty should apply to the latter case as to the former; and as the penalty admitted of no mitigation, it was sought to mitigate the offence. The principle came to be established that, where the slayer had been so provoked by an attack or other conduct directed towards him that he suddenly and temporarily lost his self-control and killed another in the ungovernable passion of the moment, the crime was reduced from murder to manslaughter. The law in this respect overlooked intention as governing the crime. To decide whether provocation was or was not sufficiently serious to amount to a crime, an objective test was evolved; how would the "reasonable man" react in the circumstances? The test is a mental test, because reason reposes in the mind. Until relatively modern times, the question whether in any particular case the provocation actually given should be regarded as amounting to an excuse was decided by the judge as a matter of law, but gradually the practice evolved that, where there was some evidence of provocation, it should be left to the jury to decide whether the actual provocation was sufficient or not. The final development was that, even though defence of provocation had not been raised, if there was some evidence of it, it was the duty of the judge to leave the issue to the jury: THORPE (1925) 18 Cr.App.R. 90; HALL (1928) 21 Cr.App.R. 48.

The law, it is submitted, has now reached this position. Where provocation is raised as a defence, the jury have to consider the matter in three stages: (i) what was the nature of the provocation? Was it slight, or was it grave? In making the assessment, the jury are entitled to consider all the circumstances of the case, including the personality of the prisoner and his particular relationship with the deceased. Here the test is subjective; (ii) was the provocation such as would cause a reasonable man to lose his self-control? (iii) If the answer to (ii) is yes, was the prisoner in fact provoked?

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A consideration of the cases shows that the test under (ii) has been clearly enunciated and brought out, but there has been no such enunciation of the test under (i). [He referred to LESBINI, 11 Cr.App.R. 70; [1914] 3 K.B. 1116; MANCINI, 28 Cr. App.R. 65; [1942] A.C. 1; and HOLMES, 31 Cr.App.R. 123; [1946] A.C. 588.] A " reasonable " man is a man of average mental state. It is conceded that, if there be some mental defect or peculiarity or condition which drives out reason, then the prisoner cannot take advantage of such a mental condition in so far as it deviates from the ordinary reasonable standard. LESBINI (*supra*): MCCARTHY (1954) 38 Cr.App.R. 74. But why is it to be assumed that a " reasonable " man in the context of the cases referred to means a normal physical man as well? If it does, the word " ordinary " has come to be associated with the word " reasonable " as a result of some looseness of thought. It is submitted that the consideration of the ordinary reasonable man must be confined to the mental state. Therefore excitable or pugnacious people, who are people of a special mental state which is inconsistent with the reasonable average mind, are rightly excluded from the category. Physical infirmity, however, is on quite a different plane and can properly make all the difference where the issue of provocation is concerned. No person who is abnormal physically can be reasonable mentally. It is reasonable that a man who is blind, or the victim of claustrophobia, or a dwarf, or sexually impotent, or scarred as a result of war injuries, should be sensitive to his condition, and to be so sensitive is not a defect of the mind, or a peculiarity of the mind which renders it unreasonable. To bear the cross of deformity or infirmity is bad enough, and to resent provocative words or acts directed thereto is not unreasonable. To test provocation in such cases in a context that excluded all consideration of the fact of physical infirmity would render the law unrealistic. Again, where does the test of age come in? Is an immature youth —and the appellant in this case was only eighteen—to be submitted to the same test as a full grown man? It is difficult to see how the objective test can be applied properly if the

aspect of physical infirmity is excluded, for in that case the reasonable man would not be placing himself in the same circumstances.

Oliver Kitson, following for the appellant:

If the "reasonable man" test is to have any relevance and value, the reasonable man must be taken to be in precisely the same situation as the prisoner with regard to all the physical circumstances present at the scene of the alleged crime. No past decision of this House casts any doubt upon that proposition. In the present case the appellant's impotence was as much a physical factor as was the knife he was carrying. To disregard it for the purpose of the test is to deal harshly with a disabled person. This runs counter to the law's "recognition of the effect of provocation on human frailty" (*per* Lord Simon, HOLMES *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 31 Cr.App.R. at p. 142; [1946] A.C. at p. 601). There is no reason to assume that a disabled man is an unreasonable man; consider men injured in war. The jury should have been directed to consider whether a reasonable man, placed in the same situation as the appellant both as to the circumstances in which he found himself, and as to his physical disability, might have been provoked into doing what the appellant did.

The Attorney-General (*Sir Lionel Heald, Q.C.*), *Richard Elwes, Q.C.*, and *J. P. Stimson*, for the Crown, were not called on to argue.

At the conclusion of the arguments the Lord Chancellor announced that the appeal would be dismissed, and that the House would give the reasons for their decision at a later date.

July 30. The following opinions were read.

LORD SIMONDS L.C.: My Lords, this appeal raises once more a question of importance in the criminal law. Your Lordships, I think, agree with me that, on examination, the question appears to be amply covered by the highest authority, but the answer can usefully be restated.

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The appellant, a youth of eighteen years, was convicted on May 27, 1954, at Leicester Assizes of the murder of Doreen Mary Redding, a prostitute. He appealed to the Court of Criminal Appeal on the substantial ground of misdirection, claiming that the learned judge who tried the case had wrongly directed the jury on the test of provocation and that, had they been rightly directed, they might have found him guilty not of murder but of manslaughter only. The Court of Criminal Appeal dismissed his appeal, holding that the jury had been rightly directed.

The relevant facts, so far as they bear on the question of provocation, can be shortly stated. The appellant has the misfortune to be sexually impotent, a fact which he naturally well knew, and, according to his own evidence, had allowed to prey on his mind. On the night of the crime he saw the prostitute with another man and, when they had parted, went and spoke to her and was led by her to a quiet court off a street in Leicester. There he attempted in vain to have intercourse with her whereupon—and I summarise the evidence in the way most favourable to him—she jeered at him and attempted to get away. He tried still to hold her and then she slapped him in the face and punched him in the stomach. He grabbed her shoulders and pushed her back from him whereat (I use his words): "She kicked me in the privates. Whether it was her knee or foot, I do not know. After that I do not know what happened till she fell." She fell, because he had taken a knife from his pocket and stabbed her with it twice, the second blow inflicting a mortal injury.

It was in these circumstances that the appellant pleaded that there had been such provocation by the deceased as to reduce the crime from murder to manslaughter, and the question is whether the learned judge rightly directed the jury on this issue. In my opinion, the summing-up of the learned judge was impeccable. Adapting the language used in this House in the cases of MANCINI *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 28 Cr.App.R. 65; [1942] A.C. 1, and HOLMES *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 31 Cr.App.R. 123; [1946]

A.C. 588, to which I shall later refer, he thus directed the jury: "Provocation would arise if the conduct of the deceased woman, Mrs. Redding, to the prisoner was such as would cause a reasonable person, and actually caused the person, to lose his self-control suddenly and to drive him into such a passion and lack of self-control that he might use violence of the degree and nature which the prisoner used here. The provocation must be such as would reasonably justify the violence used, the use of a knife," and a little later he addressed them thus: "The reasonable person, the ordinary person, is the person you must consider when you are considering the effect which any acts, any conduct, any words, might have to justify the steps which were taken in response thereto, so that an unusually excitable or pugnacious individual, or a drunken one or a man who is sexually impotent is not entitled to rely on provocation which would not have led an ordinary person to have acted in the way which was in fact carried out. There may be, members of the jury, infirmity of mind and instability of character, but if it does not amount to insanity, it is no defence. Likewise, infirmity of body or affliction of the mind of the assailant is not material in testing whether there has been provocation by the deceased to justify the violence used so as to reduce the act of killing to manslaughter. They must be tested thoughout this case by the reactions of a reasonable man to the acts, or series of acts, done by the deceased woman."

Other passages may be found in his summing-up in which he takes as the test the reaction of the hypothetical reasonable man to the alleged provocation. In the Court of Criminal Appeal, these directions were quoted and approved, and reference was made also to the recent case of MCCARTHY (1954) 38 Cr.App.R. 74, where it was held (at p. 81) that there is "... no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication."

It appeared to that court, as it appears to me, that "no distinction is to be made in the case of a person who, though

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it may not be a matter of temperament, is physically impotent, is conscious of that impotence, and therefore mentally liable to be more excited unduly if he is 'twitted' or attacked on the subject of that particular infirmity." The court thereupon approved and reiterated the proposition that the question for the jury was whether, on the facts as they found them from the evidence, the provocation was, in fact, enough to lead a reasonable person to do what the accused did.

My Lords, no other conclusion was open to the Court of Criminal Appeal, nor is any other conclusion open to your Lordships in view of the recent cases in this House of MANCINI (*supra*) and HOLMES (*supra*). The relevant part of the former decision is accurately stated in the headnote in *The Law Reports* in these words: "The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did." And Viscount Simon L.C., in a speech in which all their Lordships concurred, referred with approval to the decision of the Court of Criminal Appeal in LESBINI, 11 Cr.App.R. 7; [1914] 3 K.B. 1116. It is worth recalling that, in that case, the court said (11 Cr.App.R. at p. 9; [1914] 3 K.B. at p. 1120): "We agree with the judgment of Darling J. in ALEXANDER (1913) 9 Cr.App.R. 139, and with the principles enunciated in WELSH (1869) 11 Cox C.C. 336, at p. 338, where it is said that 'there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion'." Finally, in HOLMES' case (*supra*), Viscount Simon, in a speech in which my noble and learned friend, Lord Porter, and I, as well as Lord Macmillan and Lord du Parcq, concurred, after a prolonged hearing and an exhaustive examination of the relevant law, used these words (31 Cr.App.R. at p. 138; [1946] A.C. at p. 597): "If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss

of control as to be led to use the violence with fatal results, and (*b*) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

My Lords, in the face of this authority, I am at a loss to know what other direction than that which he gave could properly have been given by the learned judge to the jury in this case. The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed, but must also invest him with the personal physical peculiarities of the accused. Learned counsel, who argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man: for this would have been directly in conflict with the passage from the recent decision of this House in MANCINI'S case (*supra*) which I have cited. But he urged that the reasonable man should be invested with the peculiar physical qualities of the accused, as in the present case with the characteristic of impotence, and the question should be asked: What would be the reaction of the impotent reasonable man in the circumstances? For that proposition I know of no authority; nor can I see any reason in it. It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognise for that purpose some unusual physical characteristic, be it impotence or another. Moreover, the proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation, is, or may be, itself conditioned by some physical defect. It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account.

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It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in MANCINI'S case (*supra*) to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In my opinion, then, the Court of Criminal Appeal was right in approving the direction given to the jury by the learned judge, and this appeal must fail.

My Lords, my noble and learned friend, LORD GODDARD C.J., authorises me to say that he has read and concurs in this opinion.

LORD PORTER: My Lords, I concur.

LORD TUCKER: My Lords, I also concur.

LORD ASQUITH OF BISHOPSTONE: My Lords, I also concur.

Appeal dismissed.

Solicitor: C. D. Geach, Leicester, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND MR. JUSTICE ORMEROD

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Frauds by Directors—"Public Company"—Company Incorporated as Private Company under Companies Act, 1948—*Resolution for Voluntary Liquidation—"Transfer . . . of the Property of the Company"—Attempt to Cancel Debt Due to Company—Whether Offence Committed—Larceny Act*, 1916 (6 & 7 *Geo.* 5 *c.* 50), *s.* 20 (1) (ii)—*Companies Act*, 1948 (11 & 12 *Geo.* 6 *c.* 38), *s.* 330 (*b*).

On a charge under section 20 (1) (ii) of the Larceny Act, 1916, of fraudulent misapplication of money by a director of a public company, a company incorporated under the Companies Acts and coming within the definition of "private company" in section 28 of the Companies Act, 1948, is a "public company" for the purposes of the Larceny Act, 1916.

Re LYSAGHT [1898] 1 Ch. 115 and *Re* WHITE [1913] 1 Ch. 231 applied.

By section 330 (*b*) of the Companies Act, 1948, an officer of a company is guilty of a misdemeanour if, with intent to defraud creditors, he has caused to be made "a transfer of . . . the property of the company."

A charge under the aforementioned section that "[the prisoner], being a director of [a company], did, with intent to defraud creditors of the company, attempt to transfer to himself a debt . . . owing from him to the company" discloses no offence in law, as the cancellation or attempted cancellation by a company of a debt due to itself is not a transfer of property within the aforementioned section.

Appeal against conviction.

The appellant was convicted at Surrey Assizes on July 16, 1954, on an indictment containing seven counts. The first two counts each charged him with obtaining a valuable security by

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false pretences, the third with forgery, the fourth with uttering a forged document, the fifth and sixth each with fraudulent conversion of property contrary to section 20 (1) (ii) of the Larceny Act, 1916, and the seventh with attempted fraudulent transfer of property within the meaning of the Companies Act, 1948. He was sentenced by the Commissioner of Assize (Mr. Noel Macaskie Q.C.) to concurrent terms of 3 years' imprisonment on the third and fourth counts, and to shorter and concurrent terms of imprisonment on the remaining counts.

Counts 5 and 6 each alleged that the appellant "being a director of a public company, namely P. Orchard Ltd., fraudulently applied for the use of" another company a sum of money, the property of P. Orchard Ltd. P. Orchard Ltd. was incorporated under the Companies Act, 1948, as a private company within the meaning of section 28 of the Act. Count 7 alleged that he "on or about February 13, 1952, in the county of Surrey, being an officer, namely a director, of a company named P. Orchard Ltd., which on May 1, 1952, subsequently passed a resolution for voluntary winding up, did, with intent to defraud creditors of the said company, attempt to transfer to himself property of the said company, to wit, an indebtedness in the sum of £30,000 then owing by him to the said company." The further facts and the arguments appear fully from the judgment.

Viscount Hailsham, *Q.C.* and *H. P. B. Dow* for the appellant.

W. A. L. Raeburn Q.C. and *M. Littman* for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted before Mr. Commissioner Macaskie at the last assizes for the county of Surrey on an indictment containing seven counts relating to his serious misconduct as a director of a company called P. Orchard Ltd. The jury returned a verdict of Guilty on all seven counts, and the appellant received varying sentences of imprisonment, all of them to run concurrently, including sentences of 3 years' imprisonment for forgery and

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uttering forged documents. He was refused leave to appeal on those counts last week because, in the opinion of the court, it was entirely a question for the jury, and there was ample evidence on which the jury could find their verdict, and there was no misdirection. The appellant's defence tried to put the forgery on to another person whose name I will not mention, but the jury emphatically negatived that defence, because they added a rider to their verdict on the count for forgery saying that there was no foundation for the charge made against that person.

The other points, however, which were set down and argued as a matter of law by Lord Hailsham, are three. If they had been successful, they would have worked no advantage to the appellant because the conviction on the count for forgery on which he received a sentence of 3 years' imprisonment stands and for the other offences he received less sentences and they run concurrently with the sentence of 3 years. However, as Lord Hailsham says, if the appellant has been convicted of offences of which he ought not to have been, he has a right to have those convictions quashed though it would make no difference to his sentence.

The first point taken on his behalf concerns two of the counts charging him with offences as a director of a certain public company, namely, P. Orchard Ltd. He is described as a director of a public company, and the objection is that P. Orchard Ltd. is what is described in the Companies Act, 1948, as a private company. The offences were fraudulently applying moneys to the use of another company, not a public company, of which he was a director.

The section under which he was indicted is section 20 of the Larceny Act, 1916, which deals with many sorts of conversion, but the material provision for this purpose is paragraph (ii) of subsection (1) which provides that any person who: " being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own use or benefit, or for any use or purposes other than the use or

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purposes of such body corporate or public company, any of the property of such body corporate or public company . . ." shall be guilty of a misdemeanour. That has been, in one form or another, a misdemeanour, at any rate since the year 1857.

The Act of 20 & 21 Vict. c. 54, entitled " An Act to make better provision for the punishment of frauds committed by trustees, bankers and other persons intrusted with property," provided by section 1 : " If any person being a trustee of any property for the benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or purposes, or shall, with intent aforesaid, otherwise dispose of or destroy such property or any part thereof, he shall be guilty of misdemeanour." That was reproduced in section 81 of the Larceny Act, 1861, and when that section was repealed by the Larceny Act, 1916, it reappeared as part of section 20, which deals with conversion by other persons as well.

It is perfectly true that the words " public company " are there used. It is quite obvious that the legislature was dealing with two sorts of corporations, first, a body corporate, by which is meant a body corporate at common law, and secondly, a public company, which appears to have been intended to mean a company incorporated by some public Act. Any company that is incorporated under the provisions of the Companies Acts is a public company for this purpose, although there may be species of such public companies, which rank as private companies and have certain rights and privileges.

Sir Nathaniel Lindley M.R. said in *Re* LYSAGHT [1898] 1 Ch. 115, at p. 122 : " I desire to add one word as to what is a public company. I thought that the meaning of a public company was settled as long ago as MACINTYRE *v.* CONNELL (1851) 20 L.J.Ch. 284, and I take it that any company registered under the Companies Act, 1862, is a public company within the meaning of that expression in the Apportionment Act." I cannot see why if such a company is a public company for the purposes of

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the Apportionment Act, 1870, it is not a public company for the purposes of the Larceny Act. It is true that the Larceny Act is a penal statute, but I think the cases show that the expressions " public company " and " body corporate " are intended to be contrasted with anything in the nature of a partnership or association which is not an incorporated body. In our opinion, " public company " for this purpose means a company which is incorporated under the provisions of the Companies Acts, as a private company is. If one looks at the reason of the thing, conduct of this kind has been an offence ever since 1857. Private companies require just the same protection as any other sort of trading company, because very often directors of private companies fail to distinguish between their own property and the property of the company by reason of the fact that they may have turned their own business into a company. They do this for many reasons, sometimes because they do not want to be at the risk of bankruptcy, and think that if credit can be obtained they had better get it as a company. It is all the more important, therefore, that a company should not be deprived of its assets, because it will be the company which will have to be paid and can be sued.

We have no doubt that we ought to hold that " public company " in this case means a company which is incorporated under the provisions of the Companies Acts. Neville J., no mean authority on matters relating to companies, in *Re* WHITE [1913] 1 Ch. p. 231, put it in this way: Having cited the passage from the judgment of Lindley M.R. in *Re* LYSAGHT, he said at p. 238 " With that proposition I respectfully agree, but of course it does not decide whether a private company under the Act of 1908 is a public company. I am of opinion, however, that there is really no such distinction between private companies and other companies under the Act of 1908 as enables me to say, with regard to the provisions of the Apportionment Act, 1870, that a particular class of companies are private companies and other companies are public companies. I think therefore that the Apportionment Act does

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apply to private companies under the Act of 1908." Earlier in his judgment he said (*ibid.*): "But it seems to me that the use of the words 'private company' is not conclusive, because I think that phrase is only a convenient way of referring to a particular class of public companies for the purposes of the Act."

For the reasons which I have endeavoured to give, we think it is quite clear in this case that a company registered as a private company is for the purposes of section 20 of the Larceny Act, 1916, a public company. It is a company registered under a public Act, and it is a company of which particulars have to be filed at Somerset House, and so forth. I have no doubt that we should give the term the same meaning for the purposes of this Act as was given in the cases to which I have referred, though they were dealing with another Act.

The second point which has been urged in favour of the appellant is this: in count 5 he was charged that "being a director of a certain public company, namely P. Orchard Ltd., [he] unlawfully and fraudulently applied for the use of the Scottish Midland Guarantee Trust Ltd., the sum of £477 15s. 7d., the property of P. Orchard Ltd."; and there was a similar count (count 6) charging the conversion of a similar sum of money at a later date.

What happened was this: The appellant pretended that he had bought certain tractors from the Ministry of Supply. He approached a company commonly called a hire-purchase finance company, in order to get the money, and the way in which he got it was this. He pretended to the finance company that he had bought these tractors when in fact he had done nothing of the sort. He then got money out of the finance company and a hire-purchase agreement was entered into by which the company lent the tractors to the company P. Orchard Ltd. on hire-purchase terms. Everyone knows the way in which this hire-purchase business is nowadays carried out by means of finance companies. A person wants to buy a piece of machinery, a motor car or even a television set; he does not find it convenient

to pay down the money but the seller wants the money, so it is arranged that the hire-purchase company shall buy the goods from the trader, pay a lump sum down and then let the would-be purchaser have the goods on hire-purchase terms, the property remaining in the hire-purchase company.

In this case the appellant had never bought the tractors at all. When he made the representations to the hire-purchase company, he was inducing them to enter into a bogus transaction on the footing that they would acquire the tractors from the Ministry of Supply and that they would then be able to let them to the company, P. Orchard Ltd., of which he was a director. The money which he was charged with misapplying was the money of the company. He sent money to the hire-purchase company representing the monthly instalments, and of course did that to keep them quiet, otherwise this bogus transaction would have been disclosed. That was fraudulent conversion of the company's money. He was paying out the company's money on what he knew to be an absolutely bogus transaction, and he was doing that to prevent the bogus transaction being disclosed. The company got nothing, and in fact the finance company got nothing because he never bought these tractors. The tractors remained, so far as I know, the property of the Ministry; at any rate, nobody got any right to them, and the only person to get anything out of the transaction was the appellant, who got a large sum of money out of the hire-purchase company and paid it into his own bank. We think there is nothing in the point argued here in respect of that matter, and the appellant was properly convicted.

The last point which Lord Hailsham has taken on his behalf is one which we think is a good point and on which the conviction must be quashed. That is in respect of the seventh count, which charged the appellant that: "on or about the February 13, 1952, in the county of Surrey, being an officer, namely a director, of a company named P. Orchard Ltd. which on May 1, 1952, subsequently passed a resolution for voluntary winding up, [he] did, with intent to defraud creditors of

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the said company, attempt to transfer to [himself] property of the said company, to wit an indebtedness in the sum of £30,000 then owing by [him] to the said company." In the opinion of the court, that is clearly a demurrable count and discloses no offence at all, because it alleges that he, being indebted to the company, induced the company to transfer their debt to him. It is quite unnecessary to go through the somewhat technical story which is supposed to justify this count, but, assuming that he owed the company £30,000 and by some means, however dishonest or however questionable, or even honest, he induced the company to cancel the debt, that is not a transfer of the property from the company to him. He was the debtor of the company. The result of the transaction that took place was that the company were induced to record, or might have been induced to record if the offence had gone through, the debt as cancelled. How that is said to be a transfer of property I cannot understand. It is not necessary for us, as we are deciding the point on this ground, to consider whether it would be possible to frame a charge of an attempt to commit this particular offence, because to make it a transfer of property depends not on the transfer itself but upon a condition subsequent to the transfer. We need not give any decision on that because we are clearly of opinion that this count was demurrable and therefore the conviction on this count is quashed but, as I have said, that makes no difference to the sentence. To that extent the appeal succeeds but not to any other.

Conviction quashed on one count.
Conviction affirmed on other counts.

Solicitors: Ernest W. Long & Co. for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE DEVLIN

GEORGE THOMAS BULLOCK

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Accessory before the Fact—Summing-up—Whether Particular Crime in view Essential—Knowledge of Intended Unlawful Purpose Held Sufficient in Circumstances of Particular Case.

The appellant was convicted of being accessory to two offences of housebreaking and larceny. The evidence was that on each occasion a car hired by the appellant was found on the scene of the crime. The appellant's defence to each charge was an alibi. In answer to a question by the jury after retirement, the judge directed them that knowledge of the fact that the car was being used for an unlawful purpose was sufficient to constitute the appellant an accessory before the fact.

Held, that, in the circumstances of the particular case, the direction was sufficient, since, if the appellant knew that the car was to be used for an unlawful purpose, he must have permitted it so to be used.

Quaere, however, whether authorisation of a thing lent for unlawful use in a general way, without evidence of the procurement of the particular felony charged in the indictment, may in some cases fail to render the person lending an accessory before the fact.

LOMAS (1913) 9 Cr. App. R. 220 commented on and explained.

Appeal against conviction.

The appellant was convicted at Birmingham Assizes on July 21, 1954, of being accessory before the fact to two offences of housebreaking and larceny and was sentenced by the Commissioner of Assize (Sir Ernest Goodman Roberts Q.C.) to 8 years' preventive detention.

In respect of each of the offences a different car had been used and was found at the scene of the crime, and each of these cars had been hired by the appellant. The appellant's defence

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with regard to each charge was that of alibi. The case for the prosecution, and the summing-up, proceeded on the basis that the appellant had been personally concerned in each of the offences. After the jury had retired, they returned into court for further direction, and the foreman asked the following questions: "What is the law regarding a person who has knowledge of the fact that his car is being used for an unlawful purpose?" The Commissioner replied, "That is rather difficult. I do not understand the question." The foreman then said: "We are of the opinion—but we have not finally decided—that Bullock may have driven the car to Misterton Hall [the house involved in one of the charges]. We cannot reach a unanimous decision on that point and the other members of the jury—" The Commissioner then intervened and said: "Is it this what you want to know: if you are not satisfied that he was there, whether to his knowledge the car was being driven by a thief or thieves?" The foreman, "Yes." The Commissioner: "Although he may not have been the person driving the car, he knew beforehand that it was going to be used for that purpose?" The foreman, "Yes." The Commissioner, "Then he would be an accessory before the fact and would be liable to be punished accordingly."

F. H. Lawton, for the appellant. The direction which the Commissioner gave to the jury in answer to the question put by them on their return into court after retirement was wrong and was inconsistent with LOMAS (1913) 9 Cr.App.R. 220. The jury should have been told that unless the appellant knew that the car was going to be used for the particular crime charged and did something by way of encouraging its use for that specific crime he could not be an accessory before the fact. Mere authorisation for a general unlawful purpose is not sufficient.

J. A. Grieves for the Crown was not called on to argue.

DEVLIN J.: This case is concerned with two breakings and enterings. One took place between November 23 and 26,

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1953, in a house belonging to the Duke of Somerset, where a quantity of property was stolen and the second took place between January 14 and 17, 1954, in a house in Leicester which belonged to Lord Cromwell, where a quantity of property was also stolen.

It is beyond dispute that two different cars were used for the purposes of these offences and in each case the car was traced to the appellant. In each case the appellant had hired the car which was found on the scene of the offence. His explanation was that he had hired the two cars on these two occasions, but that their use for the purposes of the offences was entirely unknown to him. He said he could only suggest that from the place where the car had been parked at night it had been taken away and used for the offence and brought back without his being any the wiser. In one case the car had done quite a considerable mileage and, as he had already stated that he had never used it outside London, he found some difficulty in giving an adequate explanation of the mileage. In those circumstances there was abundant evidence to suggest that he had some connection with both crimes. It was too much to ask the jury to believe that on two separate occasions, separated by a couple of months and concerning two separate cars, the car had in each case been used without his knowledge. In the case of the crime of January, 1954, another man named Beyer was also charged and convicted and he has not appealed, but in the case of the earlier crime, the appellant was charged alone.

The summing-up, and indeed the way in which the case was presented at the trial, was on the basis that the appellant was concerned with each of the breakings and enterings. He had produced an alibi with a view to proving that on neither of these occasions could he have been away from London on the particular night. There was, therefore, an alternative possibility which apparently suggested itself to the jury during their deliberations, that it was conceivable the alibi might have been true, but the two sets of facts could be reconciled by taking the view that although the appellant did not go himself, he lent

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his car for the purpose on each occasion. Accordingly, after they had been out forty minutes or three-quarters of an hour the jury came back and the foreman put this question: "What is the law regarding a person who has knowledge of the fact that his car is being used for an unlawful purpose? (The Commissioner): That is rather difficult, I do not understand the question. (The foreman of the jury): May I continue? We are of the opinion—but we have not finally decided—that Bullock may have driven the car to Misterton Hall. We cannot reach a unanimous decision on that point and the other members of the jury"—Then the Commissioner intervened and said, "Is it this you want to know: if you are not satisfied that he was there, whether to his knowledge the car was being driven by a thief or thieves?" (The foreman of the jury) "Yes." Then the Commissioner said: "Although he may not have been the person driving the car, he knew beforehand that it was going to be used for that purpose." (The foreman of the jury) "Yes." (The Commissioner) "Then he would be an accessory before the fact and would be liable to be punished accordingly."

That direction has been criticised on the ground that in the circumstances of this case it was not adequate enough and in particular that the jury ought to have been told that, unless the appellant knew that his car was being used for the particular crime and did something by way of encouragement, then it was not enough to constitute being an accessory before the fact in law. If the case for the prosecution had been more directed towards the alternative, the summing-up would probably have dealt with the alternative more elaborately than it did. The learned Commissioner was only dealing with the question which was put to him after he had concluded his summing-up. The only point we have to determine is whether he dealt with it sufficiently clearly and gave the jury an adequate direction for the purposes of this case and we think that he plainly did.

The case that has been cited and relied upon by Mr. Lawton is LOMAS (1913) 9 Cr.App.R. 220. That case has this head note,

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"Mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact: there must be some particular crime in view." As far as the first part of that headnote goes, that is, "Mere knowledge that the principal intends to commit crime does not constitute an accessory before the fact" it is inexceptionable; mere knowledge is not of itself enough, there must be something further. But, in the circumstances of this case, once it was plain that the appellant had hired the car and had control of it, if he knew that it was being used he must also have permitted it to be used; he must formally or informally have lent it for that purpose, and that is certainly enough. The case of LOMAS is upon this point quite different. The accused person in that case had a jemmy which belonged to the burglar, a man named King, and he handed back to King King's own jemmy. It may well be that in those circumstances there was nothing but mere knowledge; he was not in a position to withhold the jemmy or permit King to use the jemmy. In this case, where the appellant had control of the car, the position is quite different.

The second part of the headnote "there must be some particular crime in view" is not derived from anything which was contained in the judgment of the Lord Chief Justice, which was a very short one. The conclusion which is stated there is at the end: "it is sufficient for us to say that the facts as found by the jury are not enough to constitute the offence." The reference to a particular crime in view comes from the rider or something in the nature of a rider which the jury attached to their verdict. The jury found the accused guilty and added "that he had a certain knowledge that the jemmy was wanted for an illegal purpose, that he handed the jemmy to King with the knowledge that it was wanted for a burglary. He did not know that it was wanted for this particular burglary." But there is nothing in the judgment to show that that point was taken by the court as being the precise point and the case could have been decided equally well on the ground that the accused had no control over the jemmy and there was no

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knowledge on his part. It is no doubt true that, if an accused merely suspects that if he lends something it may be used in a general way, that may not be enough, but it is not necessary for the purposes of this case that we should express a view one way or another on that point. If an accused person lends a man a revolver believing that it may be used to commit a crime of violence but with nothing specific in mind, it may not be enough, but this is not a case of that sort. This is a case in which a man had hired a car and which it was plain, having hired it, he was not going to put it at the disposal of anybody who wanted to borrow it; it must have been borrowed, if borrowed at all, for a specific purpose. If the appellant's case had been: "Yes, I did lend the car to Beyer. I had not an idea what he wanted it for and I lent to him without knowing that he was going to commit any particular crime," then it might be that a more careful direction than the one given ought to have been given. But one must consider the direction given in this case with the background of the admitted facts. It was a case where the appellant was saying he had never lent the car to anybody and he did not use it or know that it was being used for any unlawful purpose. Once the jury were satisfied, as they apparently were, that he did know that it was used for an unlawful purpose, there was no need to give an elaborate direction on the question whether the unlawful purpose was merely a general purpose or the intent to commit one or other of these crimes. In our judgment the direction was, in the circumstances, quite adequate and the appeal must be dismissed.

Appeal dismissed.

Solicitors: Sampson & Co. for the appellant; B. F. Chapman, Leicester, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE DEVLIN

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Sentence—Breach of Order of Conditional Discharge—Sentence of Borstal Training for Substantive Offence—One Day's Imprisonment appropriate for Earlier Offence.

The applicant was sentenced at quarter sessions to Borstal training for an offence of storebreaking and larceny. He was also before the court for sentence for an earlier offence of larceny for which he had been conditionally discharged. Quarter sessions, being of the opinion that it would be improper to pass any substantial sentence of imprisonment for the earlier offence in view of the sentence of Borstal training for the later offence, declined to pass any sentence in respect of the earlier offence.

Held, that the refusal to pass any sentence in respect of the earlier offence was wrong and that the proper course in such circumstances was to pass a nominal sentence of one day's imprisonment.

Application for leave to appeal against sentence.

The applicant was convicted at a magistrates' court on April 21, 1954, of larceny and was conditionally discharged. On October 17, 1954, he was convicted at Essex Quarter Sessions of storebreaking and larceny and was sentenced to Borstal training. The court declined to pass any sentence in respect of the earlier offence.

No counsel appeared.

DEVLIN J.: This is an application for leave to appeal from a sentence of Borstal training imposed by the Essex Quarter Sessions in respect of storebreaking and larceny. The court thinks that that sentence is perfectly proper and does not propose to interfere with it, but there was another matter which was before Quarter Sessions. The applicant earlier, on April 21, 1954, had been found guilty by a magistrates' court of larceny

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and had been conditionally discharged. Therefore, the matter for which he was before Quarter Sessions was not only the fresh offence he had committed, but also the breach of the conditional discharge, which meant that he could be sentenced for the offence for which he had been conditionally discharged. However, Quarter Sessions took the view that, since they were passing a Borstal sentence for the substantive offence before them, it would not be proper that they should pass any sentence in respect of the offence for which the applicant had been conditionally discharged. They were quite right in thinking that they could not pass a substantial sentence of imprisonment because that would have been inconsistent with the Borstal sentence, but it was suggested to them that they should pass a nominal sentence of one day's imprisonment. They decided, however, not to do so. In that respect this court thinks that they were wrong. Normally it is not desirable to impose nominal sentences of one day's imprisonment, but in this particular case it was the only way of getting round the difficulty which would otherwise occur. If no sentence at all is passed in respect of the offence for which the applicant was conditionally discharged, the conviction does not rank as a conviction and the result of it not ranking as a conviction is that if hereafter he were to commit further offences and matters were to arise on which it was necessary to prove previous convictions, such as liability for corrective training and so forth, the conviction of this offence for which he ought to have been sentenced since he has broken his conditional discharge would not rank for that purpose. The court does not feel that it can now interfere with the matter by imposing one day's imprisonment because the only sentence from which he has appealed is the sentence of Borstal training and the powers of this court are, therefore, restricted to dealing with that sentence; but the court desires to draw attention to this matter so that in future it should be noted that this is one of the rare cases in which a nominal sentence should be imposed.

Appeal dismissed.

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